

Public-Private Partnership Oversight: How FHWA Reviews P3s

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Key Terms

Acronym	Definition
ATC	Alternative Technical Concept
AU	Annual Update to the Financial Plan
CER	Cost Estimate Review
CFR	Code of Federal Regulations
DB	Design-Build
DBE	Disadvantaged Business Enterprise
DBF	Design-Build-Finance
DBFOM	Design-Build-Finance-Operate-Maintain
DEIS	Draft Environmental Impact Statement
DOT	Department of Transportation. Within this guidance, State DOT is used in place of State Transportation Agency (STA) or State Transportation Department (STD)
EEO	Equal Employment Opportunity
EIS	Environmental Impact Statement
EJ	Environmental Justice
EO	Executive Order
ESRC	Evaluation, Scoring and Rating Committee
FAHP	Federal-aid Highway Program
FHWA	Federal Highway Administration
FPA	Federal Project Agreement & Authorization
GARVEE	Grant Anticipation Revenue Vehicle
IFP	Initial Finance Plan
JPO	Joint Program Office
LRTP	Long-Range Transportation Plan
MAP-21	Moving Ahead for Progress in the 21 st Century
MPO	Metropolitan Planning Organization
MTP	Metropolitan Transportation Plan
NEPA	National Environmental Policy Act
NOI	Notice of Intent
OJT	On-the-Job Training
OMT	Oversight and Monitoring Team
P3	Public-Private Partnership
PAB	Private Activity Bond
PDT	Project Delivery Team, formerly the Major Project Team
PMP	Project Management Plan
PS&E	Plans, specification, and estimates package
QAP	Quality Assurance Plan or Quality Assurance Program, depending on context.
RFP	Request for Proposals
RFQ	Request for Qualifications
ROD	Record of Decision
ROW	Right-of-Way
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users



SEP-15	Special Experimental Project 15
SIB	State Infrastructure Bank
SOQ	Statement of Qualifications
STIP	State Transportation Improvement Program
TEA-21	Transportation Equity Act for the 21st Century
TIFIA	Transportation Infrastructure Finance & Innovation Act
TIP	Transportation Improvement Program
U.S. DOT	U.S. Department of Transportation



Introduction

Purpose

A growing number of State and local transportation agencies are considering the use of public-private partnerships (P3s), in which a private entity is involved in designing, financing, constructing, operating, and maintaining a transportation facility to address transportation needs. With rare exception, P3 projects receiving Federal-aid or credit assistance are subject to the same Federal regulations and requirements as other, traditional Federal-aid projects. Differences in the way P3s and traditional Federal-aid projects are procured, financed, and implemented raise important regulatory issues that Federal Highway Administration (FHWA) staff take into consideration as they ensure effective Federal stewardship of P3 projects in conjunction with the State or local transportation agencies. This guidance document is a reference to help State and local transportation agencies and the private sector understand how FHWA conducts stewardship and oversight of Federal-aid projects where P3s are being considered or implemented.

Background

P3s are contractual agreements formed between a public agency and a private entity that allow for greater private sector participation in the delivery and financing of transportation projects. With P3s, the private sector may take on the risks and rewards of financing, constructing, operating, and/or maintaining a transportation facility in exchange for the right to future revenues or payments for a specified period. P3s can expand the capacity of States to finance infrastructure projects while accelerating delivery times, potentially reducing project costs, transferring project risks, and improving the cost-effectiveness of long-term maintenance; however, P3s are complex transactions with notable tradeoffs that require substantial review, due diligence and technical expertise to manage effectively.

FHWA Resources on P3s

The Office of Innovative Program Delivery's website offers [resources](#) on a variety of P3 topics. Items of particular interest may include:

- [Public-Private Partnership Concessions for Highway Projects: A Primer](#)
- [Challenges and Opportunities Series: Public-Private Partnerships in Transportation Delivery](#)
- [Introduction to Public-Private Partnerships \(Presentation\)](#)

The use of P3s marks a shift away from traditional models of procuring and financing highway projects that may require special Federal stewardship considerations; but, in most cases, established and approved FHWA oversight and review processes may be applied to ensure effective stewardship. Under traditional procurement processes, private contractors construct projects based on a public design using public funding, which are then operated and maintained by public agencies. In a P3 model, the private sector may participate in the design, finance, construction operation, maintenance, and revenue collection of a project under a contract that integrates two or more of those functions. While the term 'public-private partnership' applies to a range of contract types, from design-build contracts to the lease of existing assets, this Guidance focuses on FHWA oversight responsibilities for those P3s where the State DOT, or a local public agency for which the State DOT is responsible, and the private partner are involved in some combination of designing, financing, constructing, operating, and maintaining highways over a long term.



FHWA Stewardship and Oversight Responsibilities for P3 Projects

As with all transportation projects receiving Federal-aid, FHWA staff and their State counterparts are responsible for ensuring that P3 projects demonstrate compliance with National Environmental Policy Act (NEPA), Disadvantaged Business Enterprise (DBE), and all other applicable Federal laws and regulations. The size of P3 projects and the complexity of P3 contracts and funding sources may warrant additional Federal stewardship and oversight throughout the planning, procurement, delivery, and management of a project. P3 projects typically rely on an array of innovative public and private funding and financing sources (e.g., private equity and financing, Federal credit assistance through TIFIA, and Private Activity Bonds) and transportation planning documents subject to fiscal constraint must account for these sources (23 U.S.C. 134-135). Since P3 contracts include a design-build component, there may be special Federal stewardship considerations during the procurement process regarding the extent and timing of private sector involvement in project development and design, the proposed design of the project itself, and the price reasonableness of the contract award. Additionally, since many P3s rely on Federal credit assistance through the Transportation Infrastructure Finance & Innovation Act (TIFIA) program, they are subject to the requirements and ongoing Federal financial oversight processes associated with the terms of TIFIA credit assistance. Finally, since most P3 projects are larger than \$500 million, they typically must meet FHWA Federal Major Project requirements, which include the development of FHWA-reviewed cost estimates, project management plans, and financial plans (23 U.S.C. 106). Information about the FHWA Major Projects program and guidance can be found on the FHWA OIPD website (http://www.fhwa.dot.gov/ipd/project_delivery/resources/general/index.htm).

Some of the differences between P3s and traditionally procured projects may raise questions about the appropriate role of the private sector in the development and delivery of transportation projects. For example, the private sector typically takes on a larger design role in a P3 project, which may allow the private sector to achieve cost efficiencies that otherwise might not be realized; however, FHWA Division Offices must ensure that private sector design innovations conform to the outcomes of the Federal environmental review process and other Federal requirements. During construction, P3 contracts may arrange for an independent engineer to conduct construction inspections and other oversight activities, but FHWA is ultimately responsible for ensuring that these oversight activities comply with Federal standards for construction oversight, quality assurance, and civil rights requirements. [Information about FHWA's environmental review process can be found on the FHWA's Environmental Review Toolkit website \(<http://www.environment.fhwa.dot.gov/index.asp>\).](http://www.environment.fhwa.dot.gov/index.asp)

Stewardship & Oversight Agreements

Section 106 of Title 23, United States Code (Section 106), provides the statutory requirements for project approval and oversight of the Federal-Aid Highway Program. Section 106(c)(3) requires FHWA and State DOTs to enter into an agreement relating to the extent to which the State DOT assumes project responsibilities. These agreements, called Stewardship and Oversight Agreements (S&O Agreements), include information on specific project responsibilities and provide the requirements for oversight of the FAHP (Oversight Program), as required by 23 U.S.C. 106(g). Projects using Federal innovative financing instruments such as TIFIA loans, GARVEE loans, or the establishment of a State DOT Infrastructure Bank with Federal-aid funds should be acknowledged in the S&O Agreement, and the appropriate level of FHWA oversight discussed in the S&O Agreement and/or project level agreements. Since P3 projects typically use such innovative instruments, S&O Agreements in States with P3 enabling legislation should define the responsibilities and considerations associated with the oversight of P3 projects. [Information about FHWA's Stewardship and Oversight process can be found on the FHWA's Federal Aid website \(<https://www.fhwa.dot.gov/federalaid/stewardship/>\).](https://www.fhwa.dot.gov/federalaid/stewardship/)



FHWA guidance on S&O Agreements supports a risk-based approach to project stewardship and oversight, where projects that meet criteria as having elevated levels of risk may be designated Projects of Division Interest (PoDI). PoDI are projects identified by Divisions that have an elevated level of risk (threat or opportunity) to the unit's successful delivery of Federal Highway Program. PoDI are determined on a cyclical basis and are the subject of additional FHWA guidance. FHWA Division Offices are required to develop and document criteria for identifying potential PoDIs, assessing the resulting projects, and making the final selection of PoDIs. The criteria can be documented within the S&O Agreement or referenced if the process is included in another control document. Project selection should be risk-based, and the stewardship and oversight activities should be directed toward addressing the risks. A State or local agency should work closely with the FHWA Division Office as it determines whether a project will be designated as a PoDI. Guidance for PoDI and PoCI are on the FHWA's website (http://www.fhwa.dot.gov/federalaid/stewardship/140328_podipoci.pdf).

Projects of Corporate Interest (PoCI) are a subset of PoDI that Division Offices identify that are so significant at a corporate level that FHWA assesses stewardship and oversight resource needs at a higher level. Project-specific plans for PoDIs and PoCIs, or plans on groups of these PoDI and PoCI projects, can be used to document any of FHWA's retained assumptions or other oversight strategies. S&O Agreements should provide that project plans will be developed for PoDIs and PoCIs under which FHWA may provide enhanced oversight activities, including FHWA exercising approval actions that State DOTs otherwise have assumed under the S&O Agreement.

Since P3 projects are typically large and complex and use innovative contracting and financing techniques, P3 projects will typically meet the criteria established in S&O agreements to be designated as PoDI/PoCI. Division Offices will develop project plans for P3 projects designated as PoDI/PoCI that clearly establish the FHWA oversight activities for the project.

Special Experimental Project 15 (SEP-15)

In some cases, States and FHWA have found that Federal regulations fail to account for or to adequately facilitate the development of P3s under Federal oversight requirements. In these cases, the State or local agency can work with the FHWA Division Office staff to explore whether a project may be suitable as a Special Experimental Project 15 (SEP-15). SEP-15 allows a project to apply for exceptions from, and suggest changes to, FHWA's traditional project approval procedures and policies under Title 23. SEP-15 is designed to help FHWA identify new approaches to project delivery and oversight for trial evaluation. Experiments carried out under SEP-15 are carefully structured to enable the efficient delivery of P3 projects without impairing FHWA's ability to carry out its Title 23 stewardship responsibilities to protect the public interest and the environment. [Information about FHWA's SEP-15 program can be found on the FHWA's OIPD website \(https://www.fhwa.dot.gov/ipd/p3/tools_programs/sep15.htm\).](https://www.fhwa.dot.gov/ipd/p3/tools_programs/sep15.htm)

SEP-15 addresses, but is not limited to, four major components of project delivery:

- Contracting
- Environmental compliance
- Right-of-way acquisition
- Project finance

SEP-15 may also involve elements of the transportation planning process. SEP-15 applications may include suggested changes to FHWA's traditional Title 23 project approval procedures and may require some modifications in the implementation of FHWA policy. The experiments carried out under SEP-15 are



limited to those which test Title 23 statutory, regulatory, or policy processes and procedures, but still meet the intent of the underlying statute, regulation, or policy being tested. Experiments with current programmatic Title 23 U.S.C. requirements and applicable FHWA regulations also may be considered to advance experimental projects under the authority of 23 U.S.C. 502.

Structure of Guidance

This guidance document is a reference to help State and local agencies understand how FHWA conducts its review of P3 project delivery and includes chapters on the following topics:

- Planning & Fiscal Constraint;
- NEPA;
- Major Projects Requirements;
- Procurement;
- TIFIA Requirements;
- Civil Rights & Other Federal Requirements; and
- Construction Oversight.

Each chapter provides a background of the topic, including the context for FHWA responsibilities, and documents key FHWA actions and approvals. Wherever there are critical differences between P3 procurement models and traditional procurement methods, the Guidance highlights how those differences affect FHWA staff's typical responsibilities. Additionally, since TIFIA represents a significant source of financing for P3 projects, a brief chapter on TIFIA requirements is included. Also note that while not all P3 projects will necessarily be required to complete an Environmental Impact Statement (EIS), this Guidance makes that assumption and consequently most summary tables and graphics refer to EIS-related tasks.

Table 1 below summarizes key considerations FHWA must give to P3s within each project development phase while Figure 1 presents these key considerations as a flow chart. A sample matrix of FHWA responsibilities by project phase may also be accessed under the heading "What is the role of the FHWA in the project delivery process?" at www.fhwa.dot.gov/ipd/project_delivery/faqs/#15.

**Table 1. FHWA Actions, Approvals, and Special Considerations for P3s by Project Phase**

Actions & Approvals		Key Considerations	
Planning Phase			
<ul style="list-style-type: none">Review Long Range Transportation PlanApprove STIPApprove Amendments to STIP	<ul style="list-style-type: none">Does the LRTP identify the use of P3s as a goal, objective, or strategy?Do the LRTP Financial Plan and STIP reflect anticipation of private financing?If the State does not have P3 enabling legislation, are efforts underway to enact enabling legislation and is there evidence of support by the Governor and/or legislature?Is there a dedicated revenue source(s) available to fund the project?Is the private sector interested in funding part of the project?Is the private partner depending on TIFIA, PAB, or other U.S. DOT financing for a portion of the funding amount? Can the P3 move forward if TIFIA or PAB financing is not obtained?		
NEPA Phase			
<ul style="list-style-type: none">Approve federally-funded early acquisitionsApprove Draft EIS*Review draft Project Management Plan (PMP)Review Cost EstimateReview draft Initial Finance Plan (IFP)Approve RODApprove written reevaluationAuthorize Supplemental EIS	<ul style="list-style-type: none">Is the private partner's acquisition of ROW in compliance with the Uniform Act?Be aware of potential conflict of interest issues – under no circumstance can a private entity serve as a joint lead agency in preparing a NEPA document or have any decision-making responsibility with respect to the NEPA process (23 CFR 636.109)If the State awards a contract prior to NEPA completion, it must include termination provisions in the event that the NEPA process selects a no build or no action alternative (23 CFR 636.109).If tolling is included in the purpose and need statement, was it identified and documented in the planning process?Are there other factors besides financial feasibility that justify eliminating non-tolled alternatives?Is the evaluation of tolled alternatives compliant with Executive Order 12898 and Title VI/ Nondiscrimination requirements in examining impacts on users by race, color, national origin, sex, age, disability, including low-income and limited English proficient users?		
Procurement & Pre-Construction Phase			
<ul style="list-style-type: none">Approve RFP and major addendaEvaluate ATCsApprove final PMPReview CERApprove IFPConcur with award, price reasonableness, and authorization of Federal fundsReview TIFIA requisitionAssist development of Oversight & Credit Monitoring Plan	<ul style="list-style-type: none">Does the RFQ provide local preferences or unnecessary restrictions or limitations on competition?Does the State or local public agency recipient of Federal transportation funds have in place an approved and compliant DBE program (49 CFR 26.21) and an overall goal for DBE participation (49 CFR 26.45)?If the RFP contains a DBE goal, does it establish expectations regarding what a DBE commitment plan should include?If a State issues a RFP prior to NEPA completion, does it inform proposers of the general NEPA status and state that no commitment will be made to any alternative under evaluation?If no final NEPA decision has been issued, should the design changes proposed in the ATCs be incorporated into the environmental review process?*If bidders propose ATCs after NEPA review, do they conflict with criteria agreed upon in the environmental decisionmaking process?Is there any potential for conflict of interest - have members of the bidding firms previously been involved on the environmental review team?Has the State submitted a waiver request, or is it compliant with Buy America requirements?		



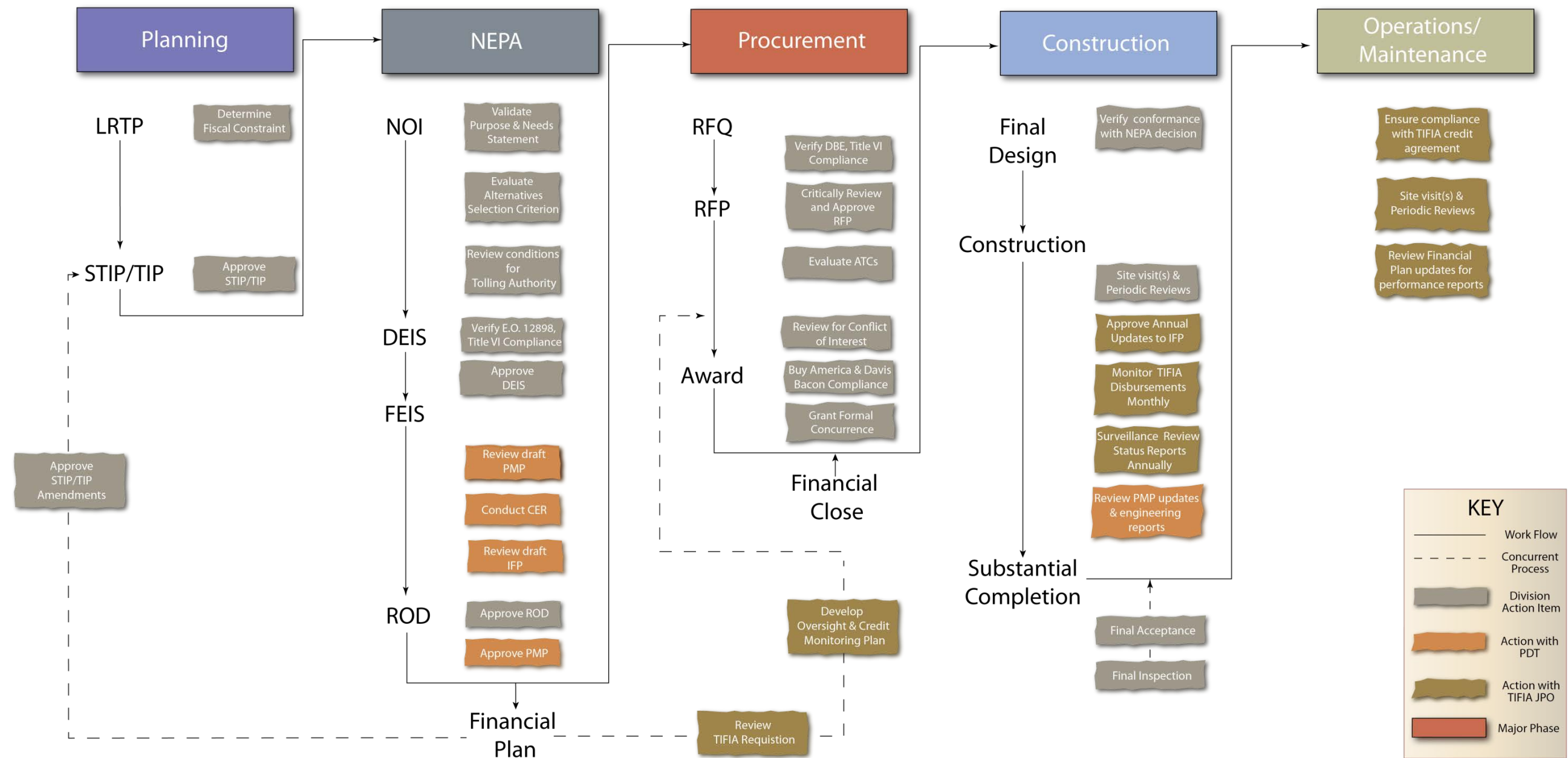
Actions & Approvals	Key Considerations
	<ul style="list-style-type: none">• Is the project compliant with Davis-Bacon prevailing wage rate requirements?• Is the procurement process compliant with Title VI/Nondiscrimination requirements regarding nondiscriminatory bidding procedures? Does the Advertising documentation (Pre-Award) contain the required Title VI/Non-discrimination language from the U.S. DOT Standard Title VI Assurance?• Division approval of IFP is required prior to contract award; if the design-builder is only given approval to proceed with final design, the IFP must be approved prior to the Notice to Proceed with construction (23 U.S.C. 106(h)).• Does the DBE commitment plan include monitoring and oversight commitments?• Do contract documents include required civil rights provisions such as 49 CFR 26.13(a) and (b) (if applicable) FHWA Form 1273 and applicable appendices of the Title VI Assurance (DOT Order 1050.2A)?• Was nondiscrimination assured, per civil rights requirements of a Title VI/Nondiscrimination Program, in the consideration of bidders' proposals?• If a project applies for TIFIA credit assistance, has it demonstrated credit worthiness, completed NEPA, and been included in an approved STIP?• If a private partner secures a TIFIA loan and the public sponsor does not receive other Federal financial assistance, then the private partner is responsible for preparing and submitting the PMP and Financial Plan.• If both the private partner and public sponsor receive Federal-aid, the State may submit the PMP and require the concessionaire to provide a detailed project development plan as a supplement.• Final PMP approval requires Project Delivery Team (PDT, formerly 'Major Project Team') concurrence
Construction Phase	
<ul style="list-style-type: none">• Conduct site visits and periodic reviews• Participate in TIFIA oversight & monitoring activities• Approve Annual Updates to the IFP• Review updated PMP• Review engineering reports• Assist in completing project status reports and annual TIFIA credit surveillance reports• Monitor TIFIA disbursements• Final Inspection• Final Acceptance	<ul style="list-style-type: none">• What unique risks does the project present as a P3 compared to a traditional procurement?• Does the size and complexity of the project warrant assigning a Division Office staff person to oversee it?• Has the independent engineer acted in conformance with Federal laws and regulations?• Has the State retained its responsibility for acceptance?• Does the State have provisions for P3 projects in the general Stewardship and Oversight Agreement?• PMP updates are necessary when project reaches major milestones or has significant changes.• PMP updates and IFP Annual Updates require PDT concurrence.

***Note that an EIS may not be the appropriate environmental review document for all P3 projects.**

****** If a NEPA review is still underway the impacts (if any) from a reasonably foreseeable ATC must be evaluated in the pending NEPA document; if a NEPA review is complete, FHWA must reevaluate to see if additional NEPA analysis is needed per 771.129 and 771.130.

Figure 1. FHWA Review Process for P3 Projects

FHWA Review Process for P3 Projects



Time



Planning & Fiscal Constraint

Transportation planners may consider P3s as a way to achieve cost and time efficiencies and to expand financing sources. Because many P3s rely on innovative financing, including private finance and equity as significant sources of project funding, they can pose challenges to FHWA staff in determining whether the metropolitan and statewide planning and programming documents that include those projects are fiscally constrained. Adding complexity to the assessment of fiscal constraint is the fact that the final financial structure of a P3 project often depends on the outcome of the procurement process, which occurs after the need to include the projects in the transportation planning and programming documents. Therefore, the exact amount of public and private funds and the time when they are required to fund the project often cannot be determined until late in the project development process.

FHWA Division Offices are responsible for determining whether a State Transportation Improvement Program (STIP) is fiscally constrained. “Fiscal constraint” describes the requirement that Metropolitan Planning Organizations (MPOs) and State Departments of Transportation (DOTs) demonstrate that funding sources are “reasonably expected to be available” to execute the statewide and regional transportation programs and regional plans (23 U.S.C. 134-135). Fiscal constraint requirements are more stringent in air quality nonattainment and maintenance areas, where projects listed within the first two years of a STIP must rely on funds that are “available” or “committed” (23 CFR 450.104). The STIP must meet the fiscal constraint requirements for each year in the cycle, and FHWA is responsible for critically reviewing and approving the STIP at the beginning of each Federal fiscal year accordingly (23 CFR 450.216(m)). The FHWA Office of Planning, Environment, and Realty issued guidance for making this determination (http://www.fhwa.dot.gov/planning/guidfinconstr_qa.cfm).

Determining Fiscal Constraint for Programs with P3 Projects

While not defined within Federal regulations, the guidance mentioned above provides indicators of reasonableness for determining whether funds are “reasonably expected to be available.” Important indicators of reasonableness include:

- Evidence of review and support of the new revenue assumption by State and local officials; and
- Documentation of the rationale and procedural steps to be taken with milestone dates for securing the funds.

Statutory and Regulatory Basis for Fiscal Constraint

As outlined in 23 CFR 450.216(m) and 23 CFR 450.324(i), in STIPs and TIPs, respectively, "financial constraint shall be demonstrated and maintained by year and shall include sufficient financial information to demonstrate which projects are to be implemented using current and/or reasonably available revenues, while federally-supported facilities are being adequately operated and maintained."

Additionally, 23 CFR 450.216(m) and 23 CFR 450.324(i) state that "In [air quality] nonattainment and maintenance areas, projects included for the first two years of the [STIP/TIP] shall be limited to those for which funds **are available or committed**.... In the case of proposed funding sources, strategies for ensuring their availability shall be identified in the financial plan."

Additionally, pursuant to 23 U.S.C. 134(j)(2)(B), the TIP must include "a financial plan that: (i) demonstrates how the TIP can be implemented; (ii) indicates resources from public **and private** sources that are reasonably expected to be available to carry out the program; and (iii) **identifies innovative financing techniques to finance projects, programs, and strategies.**"

While a financial plan may be developed for the STIP [23 U.S.C. 135(g)(5)(F)(i)], 23 U.S.C. 135(g)(5)(E) specifies that the STIP "shall include a project, or an identified phase of a project, only if full funding can **reasonably be anticipated to be available** for the project within the time period contemplated for completion of the project."

Additionally, FHWA will consider whether:

- The project sponsor will have legal authority to apply private sources of funding to a project;
- Assumptions about revenue sources dedicated to funding the project are reasonable; and
- Assumptions about private and public sources of finance for the project are reasonable.

A P3 project may be considered "reasonable," for example, if there are clear expressions of support by the Governor and/or other appropriate local/regional decisionmakers, and if a strategy exists for securing necessary approvals within the time period for implementing the affected project(s). Other indicators of "reasonableness" for P3 projects are: if a State or local jurisdiction has had past success in implementing P3s; if State enabling legislation is in place; or if efforts are underway to enact State enabling P3 legislation and there is evidence of support by the Governor and/or legislature. There should also be demonstrated interest in the project from the investment community.

Table 2 lists critical questions FHWA personnel may ask in determining whether a STIP that includes a P3 project(s) is fiscally constrained.

**Table 2. P3 Projects and Fiscal Constraint: Key Questions**

Authorization
<ul style="list-style-type: none">• Does the sponsor have legal authority to enter into a P3 under the State's P3 enabling legislation?• If the State does not have P3 enabling legislation, are efforts underway to enact enabling legislation and is there evidence of support by the Governor and/or legislature?• Has the State previously implemented, or is it in the process of implementing, a P3 project?• Has the project sponsor initiated the process of procuring the project as a P3?• Is there strong opposition to the project that could result in its cancellation?
Revenue
<ul style="list-style-type: none">• Is there a dedicated revenue source(s) available to fund the project?• If the P3 process does not move forward, does the State have the legal ability and capacity to use other strategies (including other innovative financing tools) to complete the project?• If the revenue source is tolls, does the project sponsor have legal authority to pursue tolling on the facility?• If the project depends on tolls, have studies shown that the projected revenues will be sufficient to pay for the project?• If project funding depends on future appropriations, is there evidence that the legislative body has the authority to commit funding in future years?• Does the detailed project financial plan, documenting fund sources and cash flow, demonstrate reasonable and likely funding availability?
Financial
<ul style="list-style-type: none">• Is the private sector interested in investing in the project?• Has the private partner secured a preliminary credit rating letter on the project that is at least investment grade (i.e., a rating of BBB- or higher by one of the rating agencies)?• If the private partner depends on TIFIA, PAB, or other U.S. DOT financing, discretionary funding, or grant funding for a portion of the funding amount, what is the status of this financing?• Can the P3 move forward if U.S. DOT funding is not obtained?

FHWA personnel must ensure that projects listed within the first two years of a STIP in air quality nonattainment and maintenance areas rely on funds that are “available” or “committed” (23 CFR 450.104). Therefore, the following questions supplement the list above:

- How does the project's cost estimate in the most recently adopted TIP compare to the most recent financial plan for the long range plan?
- Have the private partners, such as equity firms and commercial banks, submitted letters of commitment stating their level of contribution?

Use of Innovative Finance Tools

It is important to understand that P3s are not sources of revenue; to be financially feasible, they require a stable revenue stream and often rely on new revenue sources and innovative finance tools. Funding and financing shortfalls often motivate financial innovations, which may enable States to access more revenue, to increase capacity, or to accelerate project delivery, but which do not replace the need for funds. Some of the innovative finance tools that may support P3s include: (a) shareholder equity; (b) grant anticipation bonds/notes (GARVEEs); (c) private activity bonds (PABs) or other tax-exempt or taxable bonds; (d) private bank loans; (e) State Infrastructure Bank (SIB) loans; and (f) Transportation Infrastructure Finance & Innovation Act (TIFIA) credit assistance. Non-traditional revenue sources



include: (a) direct user charges (e.g., tolls and transit fares); and (b) other public agency dedicated revenue streams made available to a concessionaire (e.g., special assessment districts, tax increment financing, etc.).

Federal guidance provides that MPOs and DOTs may include new or innovative funding sources in Long Range Plan/TIP/STIP financial plans if historical trends or present actions demonstrate the reasonableness, or likelihood, of future legislative or executive approvals necessary to secure the revenue in time for the project's development and implementation (see 23 CFR 450.216(m), 23 CFR 450.322(f)(10)(ii), and 23 CFR 450.324(h), respectively). Those new or innovative sources would not qualify as "available" or "committed" funds for projects in nonattainment and maintenance areas until enacted by legislation, referendum or secured by contractual agreement. Furthermore, as discussed in FHWA's 2009 fiscal constraint guidance, for P3 projects, the STIP should reflect the use of innovative financing mechanisms:

- For a GARVEE-funded project, the Federal share of debt-related costs anticipated to be reimbursed with Federal-aid funds over the life of the GARVEE bonds should be designated as Advanced Construction (AC), showing GARVEE bond proceeds as the revenue source;
- For a Title 23 project including PABs, the PABs should be shown as a revenue source when used in combination with other funds, but repayment of principal and interest on the PAB does not have to be shown because it is the responsibility of the private developer/operator of the project; and
- For a project receiving TIFIA credit assistance, TIFIA credit assistance should be shown as one of the financing sources for the project and the project's financial plan should show the repayment of the TIFIA credit assistance.

Timing of Fiscal Constraint Determination

The process of determining the level of public funding required for a P3 is often iterative and may not be finalized until a project sponsor selects a preferred proposal and secures a final agreement with those financing the project. A P3 generally does not reach financial close until a project receives final NEPA approval such as a record of decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE) following the environmental review process and until a preferred proposal is negotiated through a procurement process. Since a P3's financial structure and the respective funding commitments of various private and public sources may remain unclear until late in the project development process, it may be difficult to clearly establish whether a project's funds are "reasonably expected to be available" for attainment areas or "available" or "committed" for nonattainment or maintenance areas before the NEPA decision and financial close, and thus whether the STIP/TIP demonstrates fiscal constraint. A project cannot obtain a final NEPA decision if it is not included in the fiscally constrained STIP/TIP and consequently cannot reach financial close. Ultimately, the STIP/TIP may require amendment immediately prior to financial close if its final financial structure differs significantly from the anticipated scenario approved in the original STIP/TIP.

Steps for Determining Fiscal Constraint

State DOT and MPO staff should work closely with FHWA Division Office personnel throughout the planning and project development process to ensure that planning documents that include P3 projects meet Federal fiscal constraint requirements. Figure 2 describes critical FHWA responsibilities.

Figure 2. FHWA Activities for Determining Fiscal Constraint

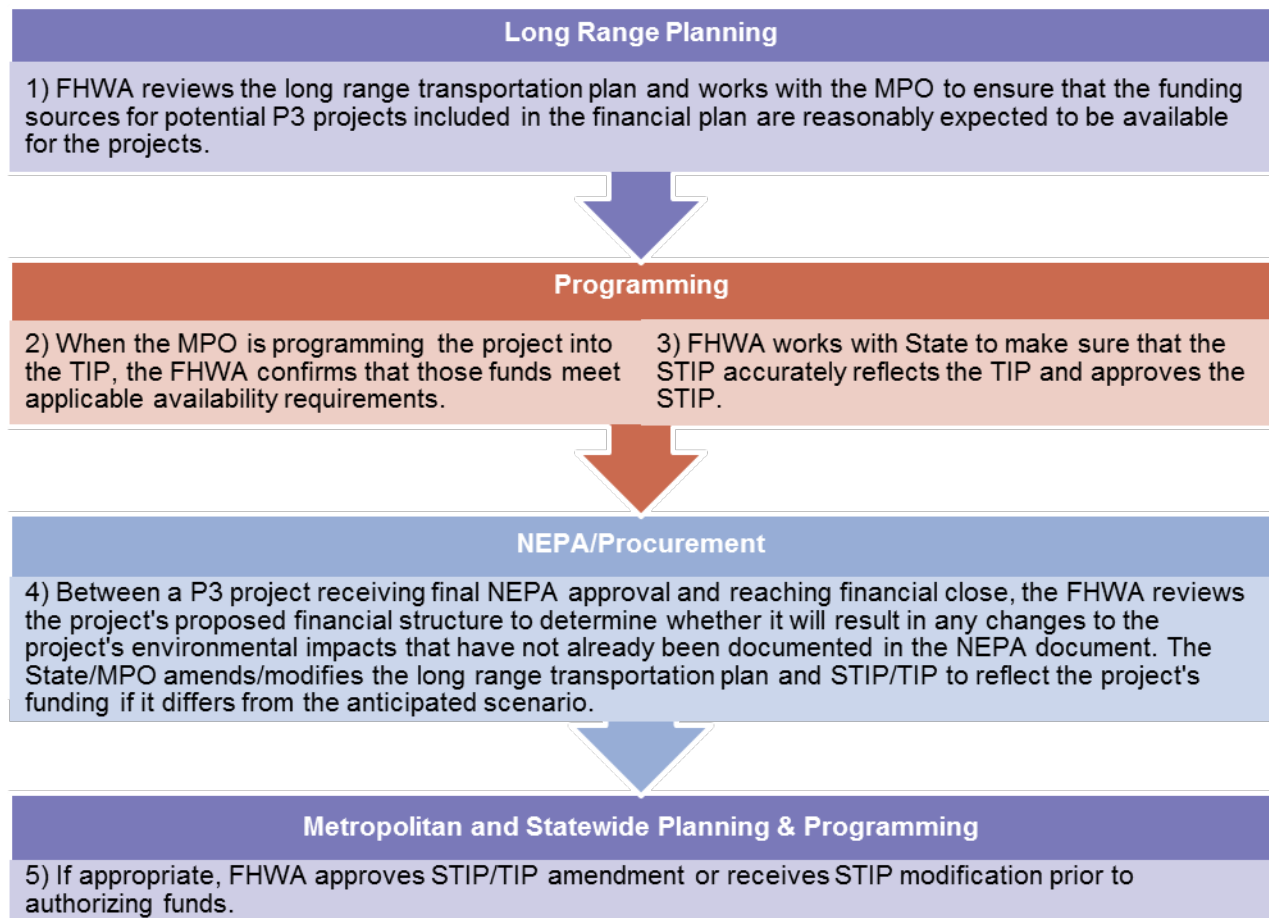


Table 3 is a spreadsheet from the Financial Planning Computational Workbook, which the Office of Planning has developed to assist MPOs and State DOTs in organizing and calculating financial data for a 20-year financial plan in the post-MAP-21 environment. In this particular sheet, MPOs and State DOTs can forecast project revenues and expenditures and can account for potential innovative financing sources in the "Innovative Financing" categories listed on the left-hand side. More information on Financial Planning and Constraint Planning Tools is available on the FHWA website at:

http://www.planning.dot.gov/financial_tools.asp.



Table 3. Fiscal Constraint – Accounting for Innovative Financing Sources

Base Year from 5-Year Cash Flow: 2013

Apply Constant Revenue Growth Rate Years 5 - 20 Enter Annual Rate (e.g. 2) : → **X%** ← Revenue Growth Rate
 Apply Constant Cost Inflation Rate Years 5-20: Enter Rate of Inflation (e.g. 3) : → **X%** ← Cost Inflation Rate

	From 5-Year Cash Flow			Year 5 Forecast			Year 6 Forecast			Year 7 Forecast			Year 8 Forecast			Average Annual		
	2017			2018			2019			2020			2021			2022	-	2032
	Revenue	Expenditures	Balance	Revenue	Expenditures	Balance	Revenue	Expenditures	Balance	Revenue	Expenditures	Balance	Revenue	Expenditures	Balance	Revenue	Expenditures	Balance
FHWA Federal Aid																		
State System	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Statewide	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Local System Programs	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Miscellaneous Formula	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Subtotal Formula	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Project	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Discretionary	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Total	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
FTA Federal Aid	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
FHWA/FTA																		
Flexible Funding	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Innovative Financing	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
GANS	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Advanced Construction																		
GARVEE	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Advanced Construction - State	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Advanced Construction - Other Federal																		
Conversions	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Other Bonds	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
State Infrastructure Banks	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Tolls	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Other	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Debt Service	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Total Innovative	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
State Fund Sources	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Local/Other Sources	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
TOTAL	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

Note: Users can apply constant inflation rate for forecast years 5 - 19 or enter data for individual forecast years 5- 8.



References

Federal Highway Administration. (2005, March 8). Transportation plan and program fiscal constraint review questions. Retrieved from www.fhwa.dot.gov/planning/fslrstrntques.cfm

The FHWA Office of Planning compiled a list of questions that are key considerations in determining whether a plan or program meets the transportation planning regulations regarding fiscal constraint.

Federal Highway Administration. (2006, August 14). Lessons learned in fiscal constraint. Retrieved from www.fhwa.dot.gov/planning/lsnlrndatchmt.htm

Based on input from several Division Offices, this document identifies key issues and lessons learned in engaging States and MPOs regarding fiscal constraint.

Federal Highway Administration. (2009, April 15). Financial planning and fiscal constraint for transportation plans and programs questions & answers. Retrieved from www.fhwa.dot.gov/planning/guidfinconstr_qa.htm

These questions and answers provide information on financial planning and fiscal constraint as part of transportation plan and program development. This information outlines the wide range of transportation planning and programming processes and practices undertaken by State DOTs, MPOs, and public transportation operators and offers a range of options under a variety of circumstances.

Federal Highway Administration. (2011, February 9). Transportation planning requirements and their relationship to NEPA approvals: Supplement to January 28, 2008 'transportation planning requirements and their relationship to NEPA process completion.' Retrieved from www.fhwa.dot.gov/planning/tpr_and_nepa/tprandnepasupplement.cfm

This document clarifies and simplifies information on what transportation planning requirements must be addressed before FHWA can make a final National Environmental Policy Act (NEPA) decision.



NEPA Requirements

Introduction

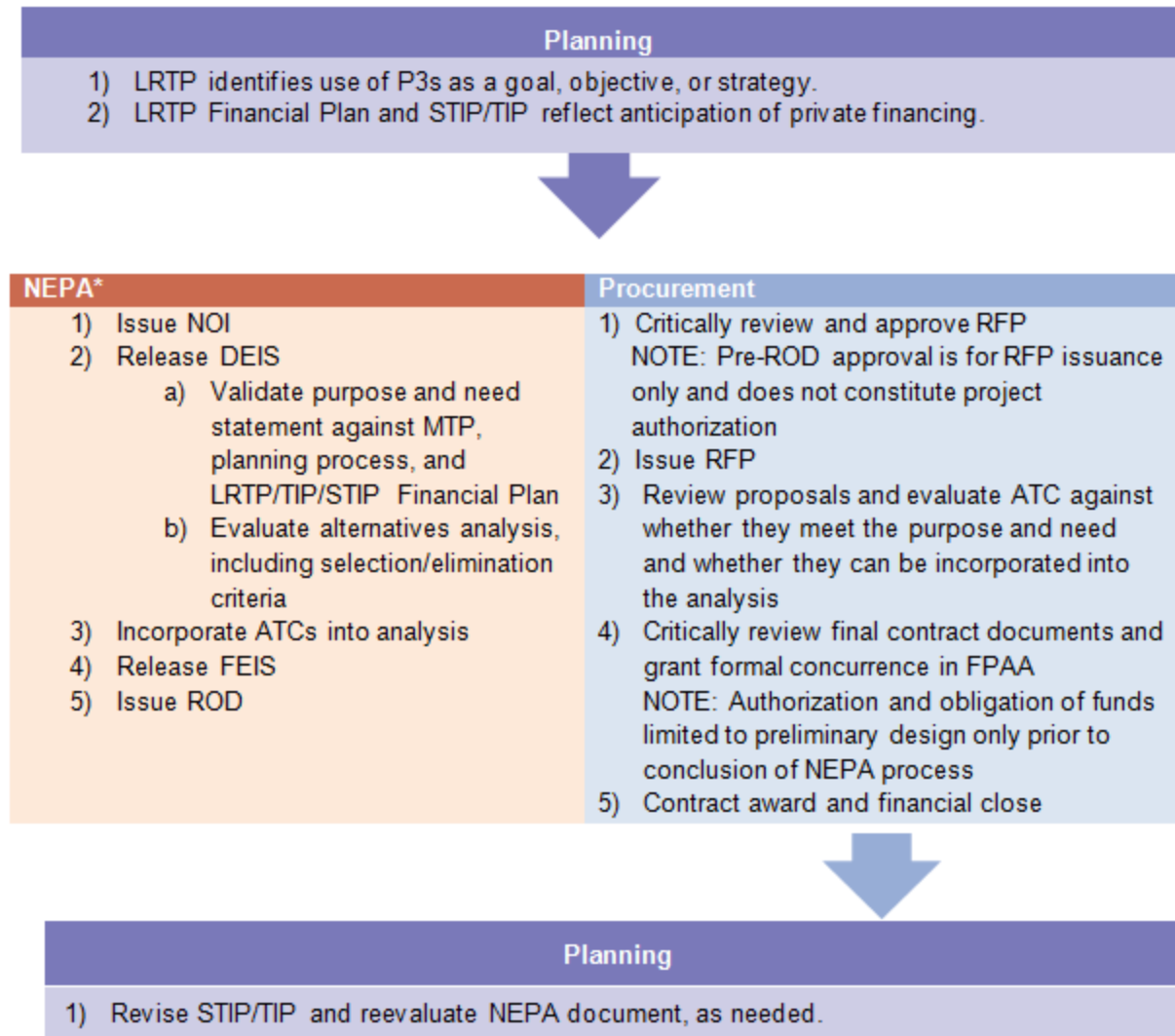
P3 projects often lead to special oversight challenges during the National Environmental Policy Act (NEPA) environmental review process. The use of design-build contracts and private financing in P3 projects can raise issues associated with the scope of the project as defined in NEPA, the consideration of alternatives not conducive to P3s, the level of involvement of private partners in the environmental review process, and the timing of reviews and approvals. Furthermore, since P3 projects frequently involve tolling, issues related to tolling in the determination of project purpose and need, the assessment of environmental impacts of changed traffic patterns, and the effects on low-income and minority populations may also apply and may need to be considered during NEPA.

Private Sector Involvement in the Federal Environmental Review Process

FHWA is typically the lead Federal agency for highway projects that require NEPA compliance, and FHWA carries out its NEPA responsibilities in partnership with the State DOT. The NEPA process helps to define a project's basic features – its purpose, location, and conceptual design, as well as any required mitigation measures. In developing a P3 project, a project sponsor needs to consider the private sector's interests in the project, such as potential return on investment; otherwise, the NEPA process may result in the selection of an alternative that meets environmental requirements but is infeasible as a P3 project. Thus, potential P3 project sponsors should consider the perspective of potential private investors early in the NEPA process and may decide to issue a Request for Proposal (RFP) prior to the conclusion of the NEPA process. Figure 3 below represents a sample timeline where the procurement process overlaps with the NEPA environmental review. It is important to note that while not all P3 projects will necessarily be required to complete an EIS, this Guidance makes that assumption and Figure 3 reflects that assumption.

The FHWA Office of Project Development and Environmental Review's website offers additional resources regarding the NEPA process in its Environmental Review Toolkit (<http://environment.fhwa.dot.gov/index.asp>).

Figure 3. Timeline of Concurrent NEPA and Procurement Processes



**Note that an EIS may not be the appropriate environmental review document for all P3 projects.*

P3 Procurement Prior to Conclusion of the Federal Environmental Review Process

P3s typically use a single contract for design and construction (and possibly for operation and maintenance) to take advantage of private sector innovations and efficiencies. In a P3 contract, the private partner must not serve as the lead sponsor of the NEPA document or have any decisionmaking responsibility with respect to the NEPA decision (23 CFR 636.109); however, the P3 contract may allow the private partner to conduct preliminary design, prepare the PS&E, and submit information to the contracting agency about environmental impacts to be considered in the NEPA analysis. The P3 procurement process typically involves a request for qualifications (RFQ) and RFP for a single contract for design and construction. The P3 contract is usually awarded on a best value basis that considers cost and other factors such as the qualifications of the responding firms.

Project sponsors may contract with potential private partners of a P3 project on a pre-development basis to assist the public sponsor in scoping and developing a preliminary design of a financially feasible



project. Such pre-development involvement reflects FHWA's actions and amendments to facilitate the use of P3s. In 2007, FHWA issued a final rule revising FHWA's regulation in 23 CFR parts 630, 635, and 636 for design-build contracting. The rule allowed contracting agencies to issue design-build RFPs, to award contracts, and to issue notices-to-proceed for preliminary design work prior to the conclusion of the NEPA process.

While a P3 contract may be awarded prior to the conclusion of the NEPA process, Federal regulations limit the involvement of private developers in the environmental review process (40 CFR 1506.1 and 23 CFR 636.109). Prior to NEPA completion, a private developer cannot complete the final design, proceed with construction, or take any other action that may bias the public sponsor toward a particular alternative (23 CFR 636.109(b)) (see the "Civil Rights & Other Federal Requirements" chapter for additional information regarding ROW acquisition). Under no circumstance can a private entity serve as a joint lead agency in preparing a NEPA document or have any decision-making responsibility (23 CFR 636.109(b)(6)).

Private developers may participate in *preliminary design* activities that contribute to the NEPA process. As defined by FHWA, preliminary design describes the general project location and design concepts. It includes preliminary engineering and other activities and analyses, such as environmental analyses, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design.

Unsolicited Proposals

A potential P3 project concept may result from an unsolicited proposal from the private sector. The private sector may also make unsolicited proposals for projects that are in the process of environmental review, recommending a new or modified alternative that could better achieve the project's purpose and need. When the private sector makes an unsolicited proposal, it is the FHWA's responsibility to determine whether the proposal fits the project's purpose and need and whether it can be incorporated into the NEPA review. Following that determination, FHWA then informs the project sponsor of whether additional review is required.

FHWA Review of Procurement Documents

FHWA staff are responsible for critically reviewing RFPs and final contract documents to ensure that all necessary provisions are present to prevent a private developer from advancing beyond the preliminary design stage during the NEPA process. If FHWA approval of the RFP occurs before NEPA completion, then the approval is only for RFP release (23 CFR 635.112(i)(2)). The RFP must inform proposers of the general status of the NEPA process and clarify that no commitment will be made to any alternative under evaluation, including the no-build alternative (23 CFR 636.109(a)(3)). If approval of the RFP occurs after NEPA completion, then the approval enables RFP issuance and constitutes project authorization (23 CFR 635.112(i)(1)).

In general, when a contracting agency awards a contract involving Federal funds, FHWA is responsible for critically reviewing the final contract documents and for granting formal concurrence in Federal Project Agreement & Authorization (FPAA) (23 CFR 635.114(b)). If the contracting agency awards a contract prior to NEPA completion, FHWA's authorization and obligation of preliminary engineering and other pre-construction funds is limited to preliminary design (23 CFR 636.109(b)(1)) and early acquisition of ROW in



accordance with 23 U.S.C. 108. The contract must include termination provisions in the event that the NEPA process concludes by selecting the no-build or no action alternative (23 CFR 636.109(b)(9)). The contract must also include provisions preventing the contractor from proceeding with final design or construction activities prior to the completion of the NEPA process (23 CFR 636.109(b)(3) and 771.113(a)). FHWA may only issue additional authorization for final design and construction once the NEPA process concludes and selects a build option (23 CFR 636.109(d)).

Alternative Technical Concepts

A procurement process may invite bidders to propose alternative technical concepts (ATCs) that potentially improve upon the project's base design. ATCs allow proposers to suggest modifications to technical requirements that would improve the project technically or reduce costs. These ATCs are confidential unless they present issues or modifications that by law must be publicly disclosed. Public sponsors typically stipulate that ATCs be "equal to or better than" an RFP's original requirements, so bidders cannot propose reducing the scope of the project, but instead must find innovative and cost-effective design solutions that enable fair cost comparisons for the public sponsor. If the project sponsor approves an ATC, the sponsor agrees to change the technical requirements only for the proposer of the ATC. If a public sponsor allows ATCs to be submitted prior to the conclusion of the environmental review process, then the public sponsor may choose to revise the alternatives and other elements being evaluated in the project's environmental review to account for the ATCs under consideration. .

The project sponsor may accept ATCs after the environmental review process is completed if the ATCs do not conflict with criteria agreed upon in the environmental decision making process (23 CFR 636.209(b)). FHWA staff are responsible for evaluating ATCs and determining the following:

- Do the ATCs meet the project's purpose and need?
- If no final NEPA decision has been issued, how will the suggested design changes be incorporated into the environmental review process?
- If a NEPA decision already has been made, do the ATC conflict with criteria agreed upon in the environmental decision making process?

Please note that if an ATC reveals a technical solution to a project that would require the project sponsor to adjust the project specifications in order to maintain compliance with a Federal or State legal requirement, the project sponsor would have to amend its RFP to incorporate this information to ensure compliance with such requirement (23 CFR 636.209(b)). For example, if a project has a 4(f) determination that there is no feasible and prudent alternative to the use of a protected property, but an ATC reveals the existence of such an alternative, the project sponsor would need to amend the RFP to reveal the existence of the alternative.

Project sponsors who wish to take advantage of private sector design innovations through the P3 procurement process post-NEPA must be careful not to overdesign the project in the NEPA process and thus unnecessarily limit the extent of design alterations that may be made by the selected private developer. Post-NEPA ATCs are typically limited to small changes in alignment or footprint that would not necessitate additional environmental review.

NEPA, Tolling and P3s

To be financially feasible, P3 projects should have dedicated revenues by which a private investor can leverage financing and achieve a return on investment. Those dedicated revenues are often derived from tolling the facility. Public sponsors seeking to develop a financially feasible project may wish to narrow the



alternatives considered to only those that incorporate tolling. Even if there is no private partner involvement yet or no decision on whether to implement a project as a P3 or with tolls, it is important that potential tolling alternatives be incorporated into the NEPA analysis.

MAP-21 and Tolling

MAP-21 made changes to the statutory provisions governing tolling on highways that are constructed or improved with Federal funds (23 U.S.C. 129). One significant change is the removal of the requirement for an agreement to be executed with the U.S. DOT prior to tolling under the mainstream tolling programs (though such agreements will continue to be required under the toll pilot programs). Other changes include the mainstreaming of provisions governing tolling new Interstates and added lanes on existing Interstates, which was previously allowed only under the *Interstate System Construction Toll Pilot Program* and the *Express Lanes Demonstration Program*. The *Value Pricing Pilot Program*, which allows congestion pricing, is continued (but without discretionary grants), as is the *Interstate System Reconstruction & Rehabilitation Pilot Program*, which allows tolling of all lanes on an existing Interstate highway when required for reconstruction or rehabilitation. MAP-21 also requires that all Federal-aid highway toll facilities implement technologies or business practices that provide for the interoperability of electronic toll collection by October 1, 2016.

A project sponsor may seek to limit the alternatives considered to those that are financially feasible. To achieve this, the project sponsor should incorporate the concept of tolling and any other possible innovative financing options, as appropriate, into the purpose and need statement or narrow the alternatives considered to those that include tolling or other options. FHWA guidance recommends for tolling to be included in the purpose and need statement if the need for tolling is identified and documented in the planning process. For example, an MPO may, through the planning process, identify a network of connected toll lanes that include a particular project under review. If a project's purpose and need statement explicitly includes tolling or P3 procurement, FHWA staff will consider the following factors to determine the validity under NEPA:

- Did the transportation planning process account for the availability of public and private resources and analyze transportation priorities based on that availability?
- Did the transportation plan identify the use of toll revenues or P3s as a goal or objective?
- Did the LRTP/TIP/STIP financial plan account for innovative financing?

Alternatively, the specific goals and objectives of a project such as urgency, congestion relief, or financial infeasibility of non-tolled alternatives, could narrow the range of reasonable alternatives to only tolled alternatives. If a project eliminates non-tolled alternatives based on financial feasibility, the FHWA staff will assess the following:

- Is the selection of alternatives supported by cost estimates and an analysis of likely revenue sources?
- Are there other factors besides financial feasibility that justify eliminating non-tolled alternatives?

A project sponsor may also adopt a "tolling-neutral" purpose and need statement, which allows for the consideration of both tolled and non-tolled alternatives. Even if non-tolled options may be eliminated



during the transportation planning process or through NEPA's alternatives analysis, it is advisable to examine non-tolled alternatives if there is public opposition to tolls. Carrying a non-tolled alternative forward in the process for a more detailed analysis—even if it is not ultimately the preferred alternative—is consistent with NEPA's hard-look mandate and could provide useful information for State and local government decisionmakers.

Environmental Justice

To meet the requirements of the Environmental Justice Executive Order (EO) 12898, the DOT Order 5610.2(a), and the FHWA revised Environmental Justice (EJ) Order 6640.23A, a project involving Federal action must consider the potential for “disproportionately high and adverse” effects on minority and low-income populations. For example, in evaluating tolled alternatives it is necessary to consider the potential economic and environmental impacts of tolling on low-income transportation users. Tolls may have disproportionate financial impacts on low-income populations and the alignment of a toll road and the spacing of tollbooths along it may impact low-income and minority communities if there are high rates of traffic diversion and consequently greater congestion and air pollution in those communities. Where multiple interconnected toll facilities exist, a regional toll analysis can be developed through the planning process and incorporated into environmental documents to analyze the impacts of toll policies by measuring and mapping the environmental and economic impacts of tolls on low-income and minority populations.



References

- AASHTO. (2008). *AASHTO Guide for design-build procurement*. Washington, D.C.: AASHTO.
This guide is intended to supply state highway agencies with strategies and methods for successful design-build implementation, including the preparation of requests for qualifications (RFQ) and requests for proposals (RFP) and the selection of a qualified proposer. It is based on best practices from experienced state highway agencies and other public sector agencies. Topics include understanding design-build, developing a design-build program, defining project goals, and allocating project risks. Over fifty contractual provision examples are provided.
- Department of Transportation. (2012) Department of Transportation Order 5610.2 (a): Final DOT Environmental Justice Order. Retrieved from http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/
DOT Order 5610.2(a) sets forth the DOT policy to consider environmental justice principles in all (DOT) programs, policies, and activities. It describes how the objectives of environmental justice will be integrated into planning and programming, rulemaking, and policy formulation.
- Federal Highway Administration. (2004, October 15). Memorandum: NEPA analysis of toll roads. Retrieved from www.environment.fhwa.dot.gov/guidebook/NEPA_tollroads.asp.
FHWA issued an informational memorandum to explain how tolling or funding availability can be part of a project's purpose and need statement and how funding availability can affect a project's alternatives analysis.
- Federal Highway Administration and Texas Department of Transportation (2009, April 23), Joint guidance for project and network level environmental justice, regional network use, and air quality analyses for toll roads. Retrieved from http://ftp.dot.state.tx.us/pub/txdot-info/env/joint_guidance_toll.pdf
This joint guidance may be a helpful resource in understanding potential environmental justice issues related to tolling.
- Federal Highway Administration. (2005, September). Manual for using public-private partnerships on highway projects. Retrieved from www.fhwa.dot.gov/ipd/pdfs/manual_0905.pdf.
FHWA released a manual explaining procedures for financing, regulating, and contracting P3s.
- Federal Highway Administration. (2010, August). Interstate system access informational guide. Retrieved from www.fhwa.dot.gov/design/interstate/pubs/access/access.pdf.
The purpose of the Interstate System Access Informational Guide is to provide both FHWA field staff and the State Departments of Transportation guidance on how and what should be addressed in requests for new or modified access to the Interstate System. The Guide provides information and methods for analyzing requests by considering the needs of the system on a national, state, and local level without compromising the integrity of the interstate system to aid FHWA in making informed decisions on requests for new or modified access to the interstate system.
- Federal Highway Administration. (2010, October 1). Order: FHWA policy on permissible project related activities during the NEPA process. Retrieved from www.fhwa.dot.gov/legsregs/directives/orders/66401a.htm
This directive clarifies FHWA's policy regarding the permissible project-related activities that may be advanced prior to the conclusion of the NEPA process.



Federal Highway Administration. (2011, November 1). Environmental justice emerging trends and best practices guidebook: Road pricing mechanisms. Retrieved from www.fhwa.dot.gov/environment/environmental_justice/resources/guidebook/guidebook04.cfm. FHWA, in cooperation with the FTA, prepared this case study document to promote a deeper understanding of the responsibilities, opportunities, and benefits derived from addressing EJ in transportation planning and implementation.

Federal Highway Administration. (2012, May 23). Every day counts. Retrieved from www.fhwa.dot.gov/everydaycounts/index.cfm. An online resource for the Every Day Counts initiative, which FHWA designed to identify and deploy innovation in shortening project delivery, enhancing road safety, and protecting the environment.

Federal Highway Administration. (2012, September 24). Memorandum: Federal tolling programs under the Moving Ahead for Progress in the 21st Century Act. Retrieved from www.fhwa.dot.gov/map21/guidance/guidetoll.cfm. FHWA issued this memo to notify Division Offices of some of the key MAP-21 changes to the Federal tolling programs. The memo details Section 1512(a) that replaces the statutory language of 23 U.S.C. 129, reviews the application of HOV/HOT provisions under 23 U.S.C. 166, discusses FHWA Program and Division Office tolling administration responsibilities, and provides a sample MOU between a Division Office and State DOT.

Federal Highway Administration. (2012, November). Federal-aid highway program guidance on high occupancy vehicle (HOV) lanes. Retrieved from <http://ops.fhwa.dot.gov/freewaymgmt/hovguidance/index.htm>. This post-MAP-21 program guidance on HOV lanes includes an overview of the legislation (23 U.S.C. 166), implementation guidance, strategies to reduce congestion and to improve air quality, and additional resources.



Major Project Requirements

Introduction

Due to the complexity of P3 contracts, project sponsors typically consider P3 procurements only for large projects. Recently, P3 projects in the United States have also tended to require public financial support, typically in the form of TIFIA financing and/or other forms of Federal or State aid. Consequently, most P3 projects must meet Federal Major Project requirements, which are applicable to projects with estimated total costs—from the NEPA phases through construction—of \$500 million or more that receive Federal financial assistance (23 U.S.C 106(h)). Under Section 106(h) of Title 23 as enacted by SAFETEA-LU, the Secretary of Transportation has the discretion to designate projects costing less than \$500 million as Major Projects. Such designations may occur in situations that include, but are not limited to, where the project requires a substantial portion of State program resources, has a high level of public or congressional interest, is unusually complex, or is likely to exceed \$500 million in total cost during the life of the project.

Recipients of Federal financial assistance for Major Projects are required to submit a Project Management Plan and a Finance Plan to FHWA for approval at major milestones (23 U.S.C. 106(h)), Projects with a total estimated cost between \$100 million and \$500 million, while not classified as Major Projects, must prepare an annual Financial Plan and must submit the Financial Plans to FHWA upon request (23 U.S.C. 106(i)), FHWA also conducts independent reviews of the project sponsor's cost estimates. The specific requirements, timing, and P3 considerations for Major Projects are described in the Major Project Financial Plan and Project Management Plan Guidance (http://www.fhwa.dot.gov/ipd/project_delivery/resources/index.htm).

Project Management Plans

As defined in Section 106(h)(2) of Title 23, a Project Management Plan (PMP) documents “the procedures and processes that are in effect to provide timely information to the project decisionmakers to effectively manage the scope, costs, schedules and quality of, and the Federal requirements applicable to, the project.” A PMP also documents “the role of the agency leadership and management team in the delivery of the project.”

Roles and Responsibilities

Because P3 projects tend to be large and complex, there may be a situation where both the public sponsor and the private entity are recipients of financial assistance. For example, if the private entity receives TIFIA credit assistance and the public sponsor issues GARVEE bonds, who is responsible for preparing the PMP? Virginia has previously handled this issue by requiring the Virginia DOT to submit the PMP and requiring the concessionaire, through the P3 contract, to provide a detailed project development plan regarding right-of-way, quality assurance, environmental concerns, etc.

Financial Plans

Financial Plans are required for all Major Projects (23 U.S.C. 106(h)). A project with a total estimated cost between \$100 million and \$500 million, while not classified as a Major Project, must also have a Financial Plan. As defined in Section 106(h)(3) of Title 23, a Financial Plan “is based on detailed estimates of the cost to complete the project and provides for the annual submission of updates that are based on reasonable assumptions, as determined by the Secretary, of future increases in cost to complete the project.” Annual Updates to the plan enable decisionmakers to track the financial progress



of a project over time by highlighting significant deviations from the Initial Financial Plan (IFP) or the subsequent annual updates and explaining the mitigation actions taken to adjust for those deviations. For information regarding the relationship between TIFIA requirements and the Major Project Financial Plan, refer to FHWA's TIFIA website.

Cost Estimate Reviews

In addition to requiring that project sponsors submit project management plans and financial plans, FHWA periodically reviews the project sponsor's cost estimates using a risk-based probabilistic process. Since cost estimates tend to become increasingly refined during the project development process, FHWA generally conducts two independent Cost Estimate Reviews (CER) during Major Project delivery: one at the end of the NEPA environmental review process and the other before the start of construction. For P3 projects, FHWA may conduct an additional CER prior to the contract award or the Notice to Proceed for construction, depending on how much time has passed since the initial CER.



References

Federal Highway Administration. (2012). Resources. Retrieved from

www.fhwa.dot.gov/ipd/project_delivery/resources/index.htm

This section of the Office of Innovative Program Delivery's website organizes Major Project delivery resources from FHWA, U.S. DOT, and other institutions. The resource page reflects the most comprehensive and current information for Major Project delivery.

Federal Highway Administration. (2013). TIFIA. Retrieved from www.fhwa.dot.gov/ipd/tifia/index.htm

At the time of this Guidance, the TIFIA Program Guide, application form and related materials are under review and are being revised to reflect MAP-21 changes. In the interim, the TIFIA website provides additional resources that may be of interest to Division Offices.



Procurement

Introduction

P3 contracts can range in complexity from design-build (DB) procurements (where a single, fixed-fee contract encompasses design and construction services) to full design-build-finance-operate-maintain (DBFOM) concessions (where a private firm is responsible for financing, designing, constructing, operating, and maintaining a highway facility over a significant period of time). Title 23 CFR Part 636, which governs design-build contracts, applies to all P3 contracts that include services in addition to design and construction (e.g., Design-Build-Finance (DBF), Design-Build-Finance-Operate-Maintain) (23 CFR 636.104). These regulations are intended to ensure that the procurement process for projects receiving Federal-aid is fair and competitive and that contract award prices are reasonable.

P3 contracts are typically based on performance specifications that allow the contractor flexibility for innovation in the selection of design, materials, and construction methods. The contracting agency identifies the parameters for the desired end result and establishes the minimum design criteria and performance standards. The prospective bidders then develop design proposals that optimize their construction and operations and maintenance abilities. The submitted proposals are typically rated by the contracting agency on the basis of design quality, timeliness, management capability, and cost.

Overview of Design-Build Regulations

The Transportation Equity Act for the 21st Century (TEA-21) authorized design-build contracting for Federal-aid highway projects and FHWA issued implementing regulations under Title 23 CFR Part 636. Under SAFETEA-LU, FHWA revised Title 23 CFR Parts 630, 635, and 636 to allow contracting agencies to issue design-build RFPs, to award contracts, and to issue notices-to-proceed for preliminary design work prior to the conclusion of the NEPA process. Finally, Special Experimental Project 15 (SEP-15), allows for the evaluation of non-traditional contracting techniques, that deviate from competitive bidding provisions under Title 23 U.S.C. 112. An objective of SEP-15 is to evaluate "project specific" innovative contracting practices, undertaken by State highway agencies, that have the potential to reduce the life cycle cost of projects, while at the same time, maintain product quality. Federal statutes and regulations do set forth specific Federal-aid program requirements; however, some degree of administrative flexibility does exist. The intent of SEP-15 is to operate within this administrative flexibility to evaluate promising non-traditional contracting practices on selected Federal-aid projects.

Regulatory Requirements for Design-build Projects include, but are not limited to:

- [23 CFR Part 172](#) for engineering service contracts
- [23 CFR Part 630](#) for pre-construction procedures
- [23 CFR Part 635](#) for purchasing materials and construction contracts
- [23 CFR Part 636](#) for design-build contracts
- [23 CFR Part 637](#) for quality assurance procedures
- [23 CFR Part 710](#) for right-of-way acquisition
- [23 CFR Part 771](#) for environmental impact and related procedures
- [23 CFR Part 774](#) for 4(f)



Application of Design-Build Regulations

In a P3 agreement, the contracting firm, or concessionaire, typically subcontracts with firms to deliver design and construction services as well as operations and maintenance services. Where the P3 agreement establishes total contract price with the concessionaire, all subsequent contracts executed by the developer are considered subcontracts and are not subject to Federal-aid procurement requirements. If the developer's contract does not establish total contract price (e.g., if the developer conducts pre-development work to determine the feasibility of a P3 project), then the developer is an agent of the owner and must follow the appropriate Federal-aid procurement requirements for all primary contracts (23 CFR 636.119(b)). To be eligible for Federal-aid, all contracts awarded by the private partner, whether deemed subcontracts or primary contracts, must comply with all applicable Federal requirements (23 CFR 636.119(c)).

Special Experimental Project 15 SEP-15 is an experimental process for FHWA to identify, for trial evaluation, new P3 approaches to project delivery. SEP-15 projects allow FHWA to evaluate new approaches to efficient delivery of transportation projects without impairing its ability to carry out its stewardship responsibilities to protect both the environment and American taxpayers. The experiments carried out under SEP-15 are limited to those which test Title 23 statutory, regulatory, or policy processes and procedures but still meet the intent of the underlying statute, regulation, or policy being tested.

SEP-15 addresses, but is not limited to, four major components of project delivery:

- Contracting
- Environmental compliance
- Right-of-way acquisition
- Project finance

SEP-15 may also involve elements of the transportation planning process. SEP-15 applications may include suggested changes to the FHWA's traditional project approval procedures and may require some modifications in the implementation of FHWA policy. Because proposed SEP-15 experiments may test current Title 23 U.S.C. requirements and applicable FHWA regulations, the appropriate Division Office must forward requests to the Deputy Administrator who will then assemble a team of co-facilitators to review the application.

Public sponsors may decide the appropriate solicitation schedule for all design-build requests, but the procurement process should follow the steps as outlined in Figure 4 (23 CFR 635.112(i)(3)). Figure 4 below shows the typical steps in a procurement process. .

Figure 4. Typical Procurement Process**Request for Proposals**

FHWA must approve an RFP for release (23 CFR 635.112(i)). Following the changes under SAFETEA-LU, public sponsors may issue design-build RFPs, award contracts, and issue notices-to-proceed for preliminary design work prior to the conclusion of the NEPA process. If a public sponsor prepares an RFP prior to NEPA completion, then FHWA may concur in the release of the RFP (23 CFR 635.112(i)(2)). FHWA's concurrence constitutes FHWA approval that any such activities comply with Federal-aid requirements and does not constitute project authorization or obligate Federal funds for final design or construction. Once the Federal environmental process is complete, FHWA approval of the RFP constitutes project authorization (23 CFR 635.112(i)(1)). Listed below are conditions that apply to the release of an RFP prior to NEPA completion:

- The RFP must inform proposers of the general status of the NEPA process and state that no commitment will be made to any alternative under evaluation (23 CFR 636.109(a)(3));
- The public sponsor must obtain FHWA approval prior to issuing addenda that result in major changes to the RFP (minor addenda must be identified prior to FHWA concurrence in award) (23 CFR 635.112(i)(4)); and
- MAP-21 S. 1503 (a)(3)(c) removed the requirement to conduct value engineering analyses for design-build projects; however, project sponsors are encouraged to conduct a value engineering analysis for those projects where the design is advanced to a stage where it is feasible to examine life cycle cost issues prior to the RFP issuance.

**Table 4. FHWA Actions & Approvals for P3 Procurements**

Procurement Activity	FHWA Action	FHWA Approval
Issue RFQ	Critically review RFQ for the possibility of local preferences or unnecessary restrictions or limitations on competition; Observe industry briefings	None
Review SOQs	Review statements of qualifications (SOQs) Observe evaluation process	None
Issue RFP	Review draft and final RFP Observe meetings with short-listed proposers Assist in responding to questions and ATCs	Approve issuance of RFP. Approve major addenda.
Review proposals	Review proposals, including ATCs Observe evaluation process Ensure compliance with DBE requirements Ensure compliance with civil rights requirements such as those pertaining to Title VI/Non-discrimination, ADA, Section 504 and Environmental Justice Review potential for conflict of interest	None
Award contract	Determine price reasonableness Review final contract documents for RFP accordance and relevant termination provisions	Concurrence in price reasonableness. Concurrence in award and authorization of Federal funds.

FHWA Participation on Evaluation/Selection Panels

A State DOT or local transportation agency should not request FHWA employees to serve on evaluation or selection panels for Federal-aid projects. The inclusion of FHWA staff on an evaluation or selection panel raises ethical concerns related to conflicts of interest and could potentially compromise FHWA's independent oversight role of the contracting agency's process and compliance with FHWA requirements. Additionally, some States or localities may have statutes or ordinances equivalent to the Federal Anti-deficiency Act, which precludes the State or local agencies from accepting voluntary services from non-State or local employees in carrying out State or local governmental responsibilities.

FHWA employees may be present during various stages of the procurement process and serve as "technical experts" on Federal requirement issues on a case-by-case basis. FHWA employees in such instances will refrain from providing advice or assistance and will limit their role to serving as a technical advisor or as an observer regarding compliance with Federal law and regulation. In general, FHWA employees participating in the procurement process as technical advisors or observers will not sign confidentiality agreements and are required to seek the advice of FHWA Legal Counsel if requested to do so.

Proposal Review

FHWA staff are responsible for reviewing the private proposals in response to an RFP and for determining whether proposed design changes conflict with criteria agreed upon in the environmental decisionmaking process. A procurement process may allow proposers to submit alternative technical concepts (ATCs) that potentially improve upon the project's design. If a public sponsor allows ATCs to be



submitted prior to the conclusion of the environmental review process, then the public sponsor may choose to revise the alternatives and other elements being evaluated in the project's environmental review to account for the ATCs under consideration. In conducting its review, FHWA staff will evaluate ATCs and determine the following:

- Do the ATCs meet the project's purpose and need?
- If no final NEPA decision has been issued, how will the suggested design changes be incorporated into the environmental review process?
- If a NEPA decision has already been made, do the ATCs conflict with criteria agreed upon in the environmental decision making process?

FHWA staff will evaluate changes, new information, and new circumstances affecting projects with a draft or final NEPA document to determine whether those changes will result in significant environmental impacts not addressed in the NEPA document (23 CFR 771.129 and 771.130). The project sponsor may accept ATCs after the environmental review process is completed if the ATCs do not conflict with criteria agreed upon in the environmental decision making process (23 CF 636.209(b)). FHWA staff will determine whether an ATC conflicts with the NEPA decision or whether additional NEPA evaluation is necessary. Prior to accepting final proposals, the public sponsor and FHWA staff review proposed ATCs and notify the short-listed proposers whether their ATCs are acceptable for inclusion in a final proposal and whether additional approval action is necessary.

Please note that if an ATC reveals a technical solution to a project that would require the project sponsor to adjust the project specifications in order to maintain compliance with a Federal or State legal requirement, the project sponsor would have to amend its RFP to incorporate this information to ensure compliance with such requirement (23 CFR 636.209(b)). For example, if a project has a 4(f) determination that there is no feasible and prudent alternative to the use of a protected property, but an ATC reveals the existence of such an alternative, the project sponsor would need to amend the RFP to reveal the existence of the alternative.

Once the public sponsor receives final proposals, FHWA staff observes the evaluation process, including the Evaluation, Scoring and Rating Committee (ESRC) activities. Ultimately, the public sponsor determines the best value proposer and submits a post-award tabulation of proposal prices to the FHWA Division Office (23 CFR 635.113(c)(2)).

Other Considerations in Proposal Review

State and local agency staff should note that P3 projects must comply with all non-procurement requirements of 23 U.S.C. including FHWA policies and construction contracting requirements such as:

- Buy America;
- Davis-Bacon prevailing wage rate requirements;
- Title VI/Nondiscrimination requirements;
- Conflict of Interest requirements;
- DBE Participation Plans; and
- Equal Employment Opportunity (EEO) and On-the-Job Training (OJT)

See the *Civil Rights & Other Federal Requirements* chapter for detailed information about these requirements.



Contract Award

In general, the contracting agency must formally request concurrence by the FHWA Division Administrator in the award of all Federal-aid contracts (23 CFR 635.114(b)). Concurrence in award by the Division Administrator is a prerequisite for Federal participation in construction costs and represents authority to proceed with construction, unless specifically stated otherwise. When a contracting agency awards a contract involving Federal funds, the FHWA staff will critically review the final contract documents and grant formal concurrence with the contract award (23 CFR 635.114(b)).

While a P3 contract may be awarded prior to the conclusion of the NEPA process, Federal regulations limit the involvement of private developers in the environmental review process (40 CFR 1506.1 and 23 CFR 636.109). If the contracting agency awards a contract prior to NEPA completion, FHWA's authorization and obligation of preliminary engineering and other preconstruction funds is limited to *preliminary design* (23 CFR 636.109(b)(1)). The contract must include termination provisions in the event that the NEPA process concludes by selecting the no-build or no action alternative (23 CFR 636.109). The contract must also include provisions preventing the contractor from proceeding with final design or construction activities prior to the completion of the NEPA process (23 CFR 636.109(b)(4)) and 771.113(a)).

FHWA may issue additional authorization for final design and construction once the NEPA process concludes and a build option is selected (23 CFR 636.109(d)). FHWA approvals of final design and construction activities are contingent upon the public sponsor's determination of, and FHWA's concurrence in, price reasonableness for such activities. To determine price reasonableness, the public sponsor must follow at least one of the following methods (23 CFR 636.302(a)(1)(v)):

- Compliance with the applicable procurement requirements for 23 CFR Parts 172, 635, or 636, where the contractor providing the final design or construction services, or both, is a person or entity other than the design-builder;
- A negotiated price determined on an open-book basis by both the design-builder and contracting agency; or
- An independent estimate by the contracting agency based on the price of similar work.

Preliminary design defines the general project location and design concepts. It includes, but is not limited to: preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design. Before NEPA completion, any preliminary engineering activities must not bias the NEPA review process toward any particular alternative under consideration (23 CFR 636.109(b)(4)).

Cost estimates may be based on expected revenue streams and therefore the FHWA staff may evaluate a project's traffic and revenue study. Traffic and revenue forecasting involves subjective estimates of the future behavior of a population with respect to housing and business location decisions and transportation choices. There is tremendous uncertainty associated with these forecasts, but a suitable study will be transparent in acknowledging those uncertainties. The FHWA staff will assess the reasonableness of assumptions in the forecast.





References

- AASHTO. (2008). *AASHTO Guide for design-build procurement*. Washington, D.C.: AASHTO.
This guide is intended to supply state highway agencies with strategies and methods for successful design-build implementation, including the preparation of requests for qualifications (RFQ) and requests for proposals (RFP) and the selection of a qualified proposer. It is based on best practices from experienced state highway agencies and other public sector agencies. Topics include understanding design-build, developing a design-build program, defining project goals, and allocating project risks. Over fifty contractual provision examples are provided.
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- Federal Highway Administration. (2007, August 14). Final rule: Design-build contracting. Retrieved from www.gpo.gov/fdsys/pkg/FR-2007-08-14/html/07-3959.htm.
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This report is a compilation of design-build procurement and contracting practices used by State Departments of Transportation and other public agencies responsible for transportation infrastructure. This report provides basic information about the design-build project delivery method and its relation to transportation projects. This document does not constitute legal advice and does not represent the official policy of the Federal Highway Administration (FHWA) or the United States Department of Transportation. It is provided for informational purposes only.



TIFIA Requirements

Introduction

Since 2008, the majority of large-scale surface transportation P3 projects in the United States have relied on flexible direct loans provided by the Federal government at favorable interest rates for a portion of their financing. This credit assistance is provided through the Transportation Infrastructure Finance and Innovation Act (TIFIA), which has become essential for attracting substantial private and other non-Federal co-investment in critical surface transportation projects across the nation.

TIFIA Overview

TIFIA provides Federal credit assistance in the form of direct loans, loan guarantees, and standby lines of credit to finance surface transportation projects. TIFIA can provide credit assistance for up to 49 percent of a project's eligible costs (if an applicant provides a rationale for credit assistance above 33 percent of eligible costs) in the case of direct loans and loan guarantees, and 33 percent of eligible costs in the case of standby lines of credit. State DOTs, local public agencies, and private firms may apply for TIFIA credit assistance for a wide range of transportation projects including highways, bridges, intermodal connectors, freight transfer facilities, transit vehicles and facilities, intercity buses and facilities, and intelligent transportation systems (ITS). The TIFIA statute is codified within sections 601 through 609 of title 23 of the United States Code (23 U.S.C. Section 601-609), with supporting regulations appearing in part 80 of title 49 of the Code of Federal Regulations (49 CFR Part 80).

To be eligible for TIFIA credit assistance projects must:

- Have a dedicated revenue source; (23 U.S.C. 602(a)(4))
- Be included in the TIP/STIP; (23 U.S.C. 602(a)(1))
- Cost at least \$50 million unless it is an ITS installation project (at least \$15 million) or a rural infrastructure project (at least \$25 million); (23 U.S.C. 602(a)(3))
- Have received two investment-grade ratings on the project's senior debt and two ratings on the TIFIA debt, unless the total senior and TIFIA debt is less than \$75 million, in which case only one of each such rating is required; (23 U.S.C. 602(b)(2)(B))
- Have completed the Federal environmental review process (including NEPA); (23 U.S.C. 602(c)(2)) and
- Have demonstrated compliance with all other applicable Federal laws and regulations including Title VI of the Civil Rights Act of 1964 and additional nondiscrimination requirements, the Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970, and DBE requirements, including consideration and implementation of appropriate contract goals ((23 U.S.C. 602(c)).

To be considered for TIFIA credit assistance, project sponsors must submit a letter of interest to the TIFIA Joint Program Office (JPO) (23 U.S.C. 602). Applicants with eligible projects are then invited to apply. The TIFIA JPO is responsible for reviewing the applications, and the DOT Secretary approves credit assistance for all projects. The TIFIA JPO then negotiates a final credit agreement with the project sponsor. As of April 2014, the TIFIA program has provided \$14 billion in credit assistance to 37 projects, including 14 P3 projects.

For detailed information on the TIFIA program, please refer to the TIFIA website at <http://www.fhwa.dot.gov/ipd/tifia/>.



TIFIA Oversight Requirements

As detailed in the TIFIA Program Guide

(http://www.fhwa.dot.gov/ipd/tifia/guidance_applications/program_guide.htm), projects receiving TIFIA credit assistance must meet special application and oversight requirements. Under DOT policy, every TIFIA project is considered a Major Project, even if its estimated cost does not meet the Major Project cost thresholds. Consequently, TIFIA recipients' oversight requirements include the development of a Project Management Plan (PMP), an Initial Financial Plan (IFP) at the onset of the project, and the submission of regular updates to the Initial Financial Plan and Project Status Reports throughout the project.

- **Prior to construction**, the borrower must meet the application requirements of the DOT (49 CFR 80.7)¹, which include developing and submitting a reviewed cost estimate, a PMP and an IFP, in addition to demonstrating compliance with other TIFIA eligibility requirements.
- **During construction**, the borrower must submit Annual Updates (AUs) to the IFP and engineering reports. (49 CFR 80.19)
- **Following construction**, the borrower must continue to submit annual updates, a substantial completion report, and an annual ratings letter. (49 CFR 80.19)

In P3 projects where the concessionaire is the TIFIA borrower, the concessionaire has primary responsibility for producing the PMP, IFP, and annual updates while the State submits a Supplemental Financial Plan. Both the concessionaire and the public agency project sponsor are required to submit a Financial Plan to cover all costs associated with the project as defined in the environmental document (49 CFR 80.7). The TIFIA JPO prefers that the State and concessionaire coordinate the submission of a consolidated Financial Plan. The concessionaire's financial plan should account for costs incurred by the concessionaire and may not account for costs incurred by the State for environmental review, preliminary engineering, ROW acquisition, etc., or for the costs of risks retained by the State. In addition, a concessionaire's Financial Plan may reflect public funding for the project, which the State's Financial Plan must document and certify as available. The State's Supplemental Financial Plan is not required to close the TIFIA loan (unless the State is obligating Federal funds), but must be provided within 90 days after the closing (49 CFR 80.7).

FHWA Division Office Roles and Responsibilities

For TIFIA-financed highway projects, the members of the Oversight and Monitoring Team (OMT) share oversight responsibilities. The OMT includes TIFIA JPO staff, FHWA Division Office (or other DOT Operating Administration) staff, and DOT Headquarters staff specialists. The OMT is responsible for monitoring progress of the project and the project's credit status throughout the life cycle of the project from execution of the credit agreement to final repayment of the credit assistance. The FHWA Division Office, however, maintains many of its traditional oversight responsibilities, including making construction-related approvals as appropriate; monitoring compliance with "standard" Federal requirements (e.g. Buy America, Disadvantaged Business Enterprise); performing design and construction oversight; and accepting completed projects. Additionally, the FHWA Division Office is responsible for participating in the TIFIA OMT activities; modifying stewardship agreements to reflect TIFIA oversight; reviewing and accepting annual financial plans; and disbursing TIFIA funds for eligible project costs. The Division Office's oversight roles and responsibilities are the same for P3 projects as for traditionally procured

¹ The TIFIA regulations (49 CFR part 80), which provide specific guidance on the program requirements, were last updated in 2001, and have not been updated to reflect changes enacted in SAFETEA-LU and MAP-21. Because such existing rules have not been updated, MAP-21 should be the basis for up-to-date guidance. The primary document that the TIFIA program has used in recent years to provide supplemental program guidance has been a "Program Guide" published on the TIFIA Web site.

projects. Table 5 demonstrates how the TIFIA JPO and the Division Office share oversight roles and responsibilities for TIFIA-financed projects.

MAP-21 and TIFIA

Moving Ahead for Progress in the 21st Century (MAP-21) expands the TIFIA program and changes application and eligibility requirements. MAP-21 increases TIFIA's budget authority from \$122 million in Fiscal Year (FY) 2012 to \$750 million in FY 2013 and to \$1 billion in FY 2014. Additionally, MAP-21 increases the share of a project's total cost that is eligible for TIFIA financing from 33 percent to 49 percent for direct loans and loan guarantees. MAP-21 also changes the TIFIA application requirements. Under MAP-21, a public sponsor may submit to the Secretary an application under which a private party to a public-private partnership will be the obligor and identified later through a procurement and selection process. Finally, the application process reverts to a rolling application process under which projects that are eligible to receive credit assistance shall receive credit assistance on terms acceptable to the Secretary if adequate funds are available to cover the subsidy costs associated with the Federal credit instrument.

Table 5. TIFIA Oversight Roles and Responsibilities

	Before Construction	During Construction	Post Construction
Review Project Management Plan	●	●	
Review Finance Plan	●	●	●
Review Construction Reports		●	
Project Status Report		●	
Create Surveillance Reports		●	●
Disbursement		●	
Review Credit Reports			●
Develop Oversight & Monitoring Plan	●		

● TIFIA Office ● Division Office

***Circles denote lead roles, however both offices are expected to participate**

Prior to Construction

The FHWA Division Office is responsible for working with the TIFIA JPO to ensure that the project meets certain prerequisites prior to commitment of TIFIA credit assistance and construction of the project. TIFIA credit assistance is established through a Term Sheet and Credit Agreement. The Term Sheet is a contractual agreement between the U.S. DOT and the borrower that establishes business terms and conditions of TIFIA credit assistance for the project. In most cases, the Term Sheet is issued in conjunction with the execution of the Credit Agreement. The Credit Agreement is the definitive agreement between the U.S.DOT and the borrower that specifies all terms and conditions of credit assistance and authorizes the disbursement of TIFIA credit assistance to the project. A sample TIFIA term sheet and



TIFIA loan agreement template are located on the FHWA website (https://www.fhwa.dot.gov/ipd/tifia/guidance_applications/form_documents.htm). To close on the Credit Agreement, the TIFIA JPO and the FHWA Division must confirm the project has, among other requirements:

- Met all Federal requirements, including the requirements set forth in the Term Sheet (49 CFR 80.9);
- Achieved an investment-grade rating from two rating agencies on the senior debt for the project (or the TIFIA debt, if it is the senior debt on the project) (49 CFR 80.11);
- Provided updates to project's IFP and PMP (49 CFR 80.19);
- Completed the Federal environmental review process and received a ROD, FONSI, or Categorical Exclusion (49 CFR 80.9 (c)); and
- Been included in the approved TIP and STIP (49 CFR 80.13(a)).

The FHWA Division Office is also responsible for helping the TIFIA Lead review the TIFIA application and the initial PMP and IFP. The IFP should be acceptable to the FHWA Division Office for the purpose of approving procurement documents and ensuring compliance with other requirements. The IFP serves as the baseline for monitoring schedule and budget performance. Finally, the FHWA Division Office works with the TIFIA JPO to develop an Oversight and Credit Monitoring Plan.

During Construction

During construction, the FHWA staff is responsible for reviewing and accepting engineering reports and monthly updates, as well as reviewing any changes to the PMP. The FHWA staff is also responsible for assisting the TIFIA JPO in developing annual Project Status Reports and responding to construction issues. The FHWA Division Office also assists the TIFIA JPO in completing annual TIFIA Credit Surveillance Reports and in coordinating bi-annual oversight meetings and site visits to review the project's status and to identify any credit risks. Finally, the FHWA Division Office is responsible for reviewing requisition invoices and for providing recommendations on the disbursement of TIFIA funds for eligible project costs.

Following Construction

For the post-construction period through final maturity of the TIFIA credit instrument, the TIFIA JPO has primary responsibility for financial monitoring and acceptance of the financial plan updates and annual ratings letters. The FHWA staff provides input on conditions affecting financial plan updates and gives concurrence to TIFIA JPO approval. FHWA Division Offices retain responsibility for monitoring TIFIA requisitions and disbursements. The project's TIFIA credit agreement defines the disbursement period and may allow disbursements up to one year following substantial completion.

Figure 5 specifies the TIFIA oversight roles and responsibilities of FHWA in each project phase.

Figure 5. FHWA Oversight Responsibilities throughout the Project Life cycle

Prior to Construction	During Construction	Following Construction
<ul style="list-style-type: none">• Help review TIFIA application• Review initial PMP• Approve IFP• Review TIFIA requisition• Assist development of Oversight and Credit Monitoring Plan	<ul style="list-style-type: none">• Review and accept AUs• Review PMP• Assist in completing Project Status reports• Assist in completing Annual TIFIA Credit Surveillance reports• Review engineering reports• Conduct bi-annual meetings and site visits• Monitor disbursements to determine eligibility of costs for reimbursement	<ul style="list-style-type: none">• Conduct site visits and periodic reviews• Review performance reports and provide input on conditions that may be affecting performance• Ensure compliance with TIFIA credit agreement• Review AUs• Monitor disbursements for up to one year following substantial completion



References

Federal Highway Administration. (2013, July). TIFIA Program Guide. Accessed at: www.fhwa.dot.gov/ipd/tifia/guidance_applications/program_guide_web.htm. This document describes the requirements of the TIFIA program.

United States Department of Transportation. (2011, December). TIFIA project oversight and credit monitoring guidance. Accessed at: www.fhwa.dot.gov/ipd/pdfs/tifia/oversight_credit_guidance_1211.pdf. The purpose of this guidance is to establish the framework for TIFIA project oversight and credit monitoring. This document provides background information on the TIFIA program, sets forth the overarching goal and key objectives for the process, describes the process for oversight and monitoring to accomplish the objectives, defines the content and scope of an oversight and monitoring plan for a TIFIA project, and delineates the roles and responsibilities of the TIFIA JPO and the responsible operating administration. The guidance includes templates for a TIFIA Project Monitoring Report, Annual TIFIA Credit Surveillance Report, Disbursement Review Checklist, and other monitoring documents.



Civil Rights & Other Federal Requirements

Introduction

While the procurement process and risk allocation among public agencies and private parties may differ for P3 projects, they must conform to the same Federal requirements as other Federal-aid projects. The FHWA staff is responsible for approving and monitoring the State's programmatic documents and for performing project-specific review to ensure that States comply with those Federal requirements, including:

- Buy America
- Davis-Bacon Prevailing Wage Rates
- Conflict of Interest Policies
- Uniform Relocation Assistance and Real Property Acquisition Policies Act
- Executive Order 12898
- Title VI/Nondiscrimination
- Disadvantaged Business Enterprises
- Equal Employment Opportunity (EEO) and On-the-Job Training (OJT)

Buy America

Under 23 U.S.C. 313, all steel and iron products that are permanently incorporated into a Federal-aid project must be manufactured in the United States. P3 projects that receive Federal funding are subject to Buy America requirements. Waivers may be granted, however, when steel and iron materials/products are not produced in the United States in sufficient and reasonably available quantities of a satisfactory quality or when the Secretary determines that it is in the public interest. FHWA must provide public notice and solicit public comments for all proposed waivers (23 CFR 635.410).

If a State DOT is interested in pursuing a waiver of Buy America requirements, then it must submit a waiver request to the FHWA Division Office for preliminary reviews and recommendations (23 CFR 635.410 (c)(1)(i)). The request should include all necessary information (such as an analysis of re-design of the project using alternate or approved equal domestic products and an explanation of the State's efforts to locate a domestically manufactured product). The FHWA staff will review the request and then forward the request to FHWA's Office of Program Administration for a formal in-depth review and final decision.

**MAP-21 Update to Buy America**

MAP-21 Section 1518 broadens the applicability of FHWA's Buy America requirements to "...all contracts eligible for assistance under this chapter for a project carried out within the scope of the applicable finding, determination, or decision under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), regardless of the funding source of such contracts, if at least one contract for the project is funded with amounts made available to carry out this title."

Thus, if one contract within the scope of a NEPA document (using either Federal-aid funding or 100 percent State/local funds), is awarded after October 1, 2012 and does not comply with Buy America, then all contracts within the scope of the NEPA document would then be ineligible for Federal-aid participation. This requirement applies to contracts and subcontracts let by the contracting agency or by a developer under a P3.

Davis-Bacon Prevailing Wage Rate Requirements

The Davis-Bacon Act, codified in 23 U.S.C. 113, applies to all P3 projects involving construction within the right-of-way of a highway and receiving Federal-aid. Many States have prevailing wage laws that mirror or exceed the Federal requirements. Details regarding the applicability of prevailing wage requirements are available in FHWA's [June 26, 2008 memorandum](#).

FHWA is ultimately responsible for ascertaining whether a project's construction contract incorporates the required Davis-Bacon contract clauses. Primary day-to-day responsibilities for administering and enforcing the prevailing wage rate requirements, however, may be held by the State DOT. The Stewardship and Oversight Agreement should clearly document the roles and responsibilities for administration of prevailing wage rate requirements.

Conflict of Interest Policies

There is a greater chance for conflict of interest during P3 projects because they are generally costly, complex projects and the market of private firms involved in P3 projects is relatively small. Consequently, firms may be involved in multiple phases of project development and may face conflict of interest issues. States generally have statutes or policies regarding conflict of interest, and the project's RFQ and RFP documents and any supporting contracts should reference those statutes or policies (23 CFR 1.33 and 636.116(a)). To the extent that a State's organizational conflict of interest standards are more stringent than the Federal provisions for identifying, mitigating, and eliminating apparent or actual conflicts of interest, the State standards prevail (23 CFR 636.116(b)). In the absence of State laws and procedures governing improper business practices and personal conflicts of interests, the requirements of 48 CFR 3 will apply to the Evaluation, Scoring, and Rating Committee (ESRC) team members (23 CFR 636.117). FHWA employees participating in the procurement process as technical advisors or observers will not sign confidentiality agreements and will seek the advice of FHWA Legal Counsel if requested to do so.



Uniform Relocation Assistance and Real Property Acquisition Policies Act

The “Uniform Act” (42 U.S.C. 4601 et seq.) establishes fundamental protections for persons forced to sell property or to move from property as the result of a Federal or federally-assisted project. Those protections include: an acquisition process ensuring fair market value; relocation benefits for the seller; and relocation benefits for the tenants. It is the responsibility of the Federal, State, and local government entities (and, under certain conditions, private parties) to provide assistance to displaced or relocated persons when acquiring real property for a Federal or federally-assisted program or project.

Uniform Act Compliance by Private Partners

The requirements of the Uniform Act may apply to a private entity if it purchases ROW that is used in a Federal or federally-assisted highway project. The application of the Uniform Act depends on the degree to which the activities of the private entity can be fairly attributable to the State or can be said to be undertaken “for a federally-assisted project.” Specifically, the Uniform Act:

- **Does not apply to wholly independent activity:** The Uniform Act does not cover the independent acquisition and displacement activities of a private entity that do not involve or contemplate the use of Federal funds in any part of the existing or future project (23 CFR 24.101 (b)). Truly independent actions taken by a private entity, where the risk and cost are borne by the private entity, are not covered by the Uniform Act.
- **Applies fully when the private entity acts on behalf of the State:** All of the requirements of the Uniform Act apply when a private entity receives Federal financial assistance directly; and when a private entity acting on behalf of the State, by virtue of a formal or informal agreement, acquires the property that is needed for a federally assisted project (23 CFR 24.101 (b)). For example, if a private developer offered to acquire property needed for a federally-assisted project to reduce the cost to the State so that the State would expedite the project delivery schedule, the activities of the private developer must comply with the Uniform Act. Because of the relationship or understanding that exists between the State and the developer, the State, as the Federal-aid recipient, is responsible for ensuring compliance with the Uniform Act requirements. The State is not allowed to evade the Uniform Act by doing indirectly (through a third party) what it could not do directly.

The Federal agency providing Federal assistance to a project is responsible for determining Uniform Act compliance as part of its decision to provide funding. In making this determination, factors considered in determining whether the Uniform Act applies to a private entity acquisition may include:

- The existence or absence of an agreement between the developer and the government agency;
- The degree to which decisions made by the developer or the government agency are coordinated or independent, even in the absence of an agreement;
- The risk borne by the developer in acquiring the property;
- The existence of any financial or other benefit to the developer connected to the property acquisition;
- The timing of the acquisition in relation to other steps in the project development process; and
- The degree of involvement by the government agency in facilitating the acquisition of the property by the developer.

Title 23 U.S.C. 156 applies to any disposal of real property that was acquired with the participation of Federal-aid highway funds. Specific requirements include:



- 1) States, or other acquiring entities, must charge fair market value for the sale or lease of any such property (unless it is used by a utility or for another Title 23 project). Title 23 CFR Part 710 Subpart G prescribes the standards for ensuring fair market value is received by a highway agency under concession agreements involving federally-funded highways.
- 2) The Federal share of net income derived from the sale or lease of such property must be used by the State for Title 23 projects (23 CFR 710.401(e)).

For example, if a State leases airspace over an Interstate for private uses that are appropriate and not harmful to highway operations, the State may retain all of the income that it obtains from that lease as long as the percentage of income equivalent to the amount of the Federal share on the project is used for projects eligible under Title 23.

Advance Acquisition of Real Property Interests

Typically, ROW for a Federal-aid highway project is purchased after the environmental analysis for the project has been completed and a project agreement executed; however, a project sponsor may find that early acquisition, prior to completion of the environmental review process, is necessary to preserve a highway corridor or for other reasons.

Under Title 23 U.S.C., there are several methods for accomplishing early acquisition. Primary authorities appear in 23 U.S.C. 108. As amended by MAP-21, the statute provides three approaches to funding early acquisitions:

1. After-the-fact credit;
2. After-the-fact reimbursement; and
3. Acquisition with Federal assistance as a separately authorized project under section 108(d).

Each method is subject to the requirements in the statute and in implementing regulations at 23 CFR Part 710. The conditions applicable to section 108(d) early acquisitions projects, which are authorized for funding prior to the acquisition action, include completion of an environmental review for the acquisition project and certification by the State, as described in Title 23 U.S.C. 108 (d)(3)(B), that the acquisition of the real property interest:

- a) is for a transportation purpose;
- b) will not cause any significant adverse environmental impact;
- c) will not limit the choice of reasonable alternatives for the project for which the property would be used, or otherwise influence the decision of the Secretary on any approval required for the project;
- d) does not prevent the lead agency from making an impartial decision as to whether to accept an alternative that is being considered in the environmental review process for the project for which the property would be used;
- e) is consistent with the State transportation planning process under section 135;
- f) complies with other applicable Federal laws (including regulations);
- g) will be acquired through negotiation, without the threat of condemnation; and
- h) will not result in a reduction or elimination of benefits or assistance to a displaced person required by the Uniform Act and title VI of the Civil Rights Act of 1964.

Federally-funded early acquisitions must be voluntary. Furthermore, real properties acquired may not be “developed” in anticipation of the transportation project until the environmental review process for the transportation project has been completed.

**Executive Order 12898**

To meet the requirements of the Environmental Justice Executive Order (E.O.) 12898, the DOT Order 5610.2(a), and the FHWA EJ Order 6640.23A, a project involving Federal action must consider the potential for “disproportionately high and adverse human health or environmental” effects on minority populations and low-income populations, and address such effects on those populations in a manner consistent with the provisions in the Orders. According to FHWA EJ Order 6640.23A, a finding relevant to the above-mentioned effects on minority and/or low-income populations “must be included in the planning or NEPA documentation that is prepared for the appropriate program, policy, or activity.” A P3 project’s NEPA document should include consideration of the impacts on minority and low-income transportation users. For example, many P3 projects rely on toll revenues to leverage private financing; therefore, it may be necessary for the NEPA document to consider the impacts of tolling alternatives on minority and low-income transportation users if there is a potential tolling alternative. The alignment of a toll road and the spacing of tollbooths along it may impact low-income and minority communities if there are high rates of traffic diversion and consequently greater congestion and air pollution in those communities.

Title VI/Nondiscrimination

FHWA staff will ensure inclusion of and compliance with requirements of Title VI of the Civil Rights Act of 1964 and other nondiscrimination authorities such as the Federal-aid Highway Act of 1973 (prohibiting discrimination based on sex), the Age Discrimination Act of 1975, the Civil Rights Restoration Act of 1987, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, Executive Orders 12898 (Environmental Justice), and 13166 (Limited English Proficiency), and subsequent and related memoranda.

During the NEPA and design process (including ROW acquisition), it is important for a P3 project sponsor to study a project’s potential socio-economic impacts as required under the State’s Title VI/Non-discrimination Program. All recipients should have project development data collection and analysis, public involvement/participation, and contract administration (including advertising and award) processes that are Title VI/Nondiscrimination-compliant. If a non-State DOT recipient does not have one or more of these processes developed and in operation, then it may adopt the State DOT’s process. During NEPA, FHWA staff will review and provide comments on how a project’s final environmental document addresses Title VI/Nondiscrimination issues. Additional FHWA oversight responsibilities include but are not limited to:

- Implementation of State compliance procedures and activities;
- Inclusion of FHWA Form 1273 in all construction contracts and subcontracts;
- Inclusion of DOT Order 1050.2A Title VI Assurance Appendix A and any other applicable appendices in all construction and consultant contracts and subcontracts, regardless of tier; and
- State adherence to 23 CFR 200.9 and 49 CFR 27.

Disadvantaged Business Enterprise Requirements

All Federal-aid projects are subject to the legislative and regulatory Disadvantaged Business Enterprise (DBE) requirements as specified in 49 CFR Part 26. These regulations are intended to ensure non-discrimination in the award and administration of DOT-assisted contracts and to remove barriers to participation of DBEs in DOT-assisted contracts. All Federal-aid recipients are required to have FHWA-approved DBE Program Plans that set forth the manner in which their programs will be administered (49 CFR 26.21). State DOTs must also operate under an FHWA-approved overall DBE goal developed every three years (49 CFR 25.45(f)(91)(i)). A direct or sub-recipient of FHWA funds other than a State DOT



should be directed to operate under the State DOT's FHWA-approved DBE Program Plan and overall DBE goal. If the recipient wishes to develop its own DBE project goal, it must follow the requirements set forth in 49 CFR §26.45(e)(3). All project goal methodologies are subject to the approval of FHWA for legal sufficiency. The federal portion of all DBE utilization on TIFIA projects must be included in each State DOT's Uniform Report of DBE Awards and Commitments submitted to Division Offices on a bi-annual basis.

If an RFP includes a contract DBE goal, bidders must either meet the contract goal or submit documented good faith efforts (49 CFR 26.53(a)). The State DOT, or Federal-aid recipient, must evaluate whether a bidder that fails to meet the contract goal has made adequate good faith efforts (49 CFR 26.53(c)). In so doing, the State DOT, or Federal-aid recipient, must make a fair and reasonable judgment as to the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. State DOT, or Federal-aid recipient, determinations that a bidder has not made good faith efforts are subject to administrative reconsideration by a State DOT official who did not participate in the original determination that the bidder failed to meet the contract goal or make adequate good faith efforts to do so. For more on DBE goals and good faith effort requirements, see 49 CFR §26.53, and 49 CFR Part 26 Appendix A. Note that DBE commitments above the goal must not be used as a proposal evaluation factor in determining the successful bidder (23 CFR 635.107(b)). Once a bidder has committed to DBEs to meet the contract/project goal, it may not terminate the DBE without good cause and the State DOT's prior written consent. For details, see 49 CFR 26.53(f).

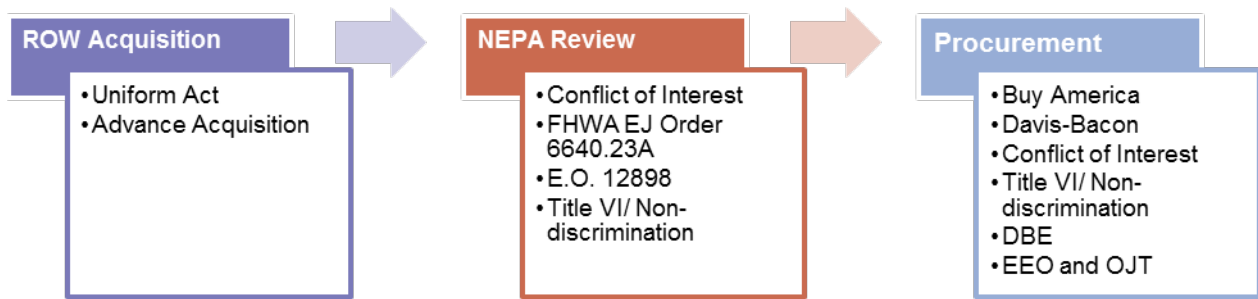
EEO and On-the-Job Training (OJT)

23 CFR 230.405 requires State DOTs to assure compliance by contractors with equal opportunity requirements under Executive Order 11246, as amended, and under Title 23 U.S.C. Appendix B to Subpart A of 23 CFR Part 230 requires contractors to provide on-the-job training to assist with qualifying and upgrading females and minorities to work as journeymen. FHWA staff is responsible for ensuring EEO and OJT compliance, largely through providing oversight of and assistance to the State DOT in conducting Contractor Compliance Reviews, but also by assuming jurisdiction over any matter affecting the Equal Opportunity Program, if necessary. Because P3s may involve large numbers of contractors, subcontractors and employees, FHWA staff will encourage the State DOT to develop a specific program or plan for monitoring contractor compliance on the P3 project. FHWA staff will also work proactively in coordination with the State DOT to ensure that bidders are aware of their EEO/OJT responsibilities, including the fact that compliance will be monitored according to 23 CFR 230.409 and related authorities.

Conclusion

Figure 6 summarizes the above Civil Rights and non-procurement requirements that apply to P3 projects by phase of project development:

Figure 6. Key Civil Rights & Other Applicable Federal Requirements by Phase





References

- Federal Highway Administration. (2008, June 26). Applicability of prevailing wage rate requirements to Federal-aid construction projects. Retrieved from www.fhwa.dot.gov/construction/contracts/080625.cfm
The purpose of this memorandum is to consolidate and briefly restate existing guidance and policies concerning the applicability of the prevailing wage rate requirements under 23 U.S.C. 113.
- Federal Highway Administration. (2012, February 1). Davis-Bacon and related acts: Questions and answers. Retrieved from www.fhwa.dot.gov/construction/contracts/dbra_ga.pdf
This document covers frequently asked questions regarding the applicability of and various oversight responsibilities for Davis-Bacon requirements.
- Federal Highway Administration. (2012, August 27). Federal-aid essentials for local public agencies. Retrieved from www.fhwa.dot.gov/federal-aidessentials/
This website provides a resource library of informational videos and related materials on key topics related to the Federal-aid Highway Program, including civil rights, project development, project construction and contract administration, finance, right-of-way, and environment. While designed to help local agency staff, these videos may also serve as useful references for Division Office staff.
- Federal Highway Administration. (2012, September 25). Early acquisition and Uniform Act questions & answers. Retrieved from <http://www.fhwa.dot.gov/map21/qandas/qauniformact.cfm>
This webpage summarizes relevant amendments to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 under MAP-21 Section 1521.
- Federal Highway Administration. (2012, December). Construction & project management discipline support site. Retrieved from <https://one.dot.gov/fhwa/CPMDSS/Reference%20Library1/Forms/AllItems.aspx?RootFolder=%2fhwa%2fCPMDSS%2fReference%20Library1%2fArea%20Engineers%20Manual&FolderCTID=%2f7bFBF3AA3F%2dCF65%2d413B%2dBC4F%2d4D65D9E603A5%7d>
This document and reference library is accessible only to U.S. DOT staff and contains useful materials such as the 2010 Area Engineer Manual.
- U.S. Department of Transportation. (2004, December). Report to congress on public-private partnerships. Retrieved from www.fhwa.dot.gov/reports/pppdec2004/index.htm
House Report 108-243 (2003) accompanying the FY 2004 Department of Transportation Appropriations Act requested the U.S. Department of Transportation (DOT) to prepare a report identifying the impediments to the formation of large, capital-intensive highway and transit projects involving public-private partnerships. In this report, U.S. DOT answers the questions posed by Congress and attempts to provide a resource document for States interested in using public-private partnerships as a method of procurement. Appendix H of the report discusses Federal requirements for Federal-aid projects as they apply to P3s.



Construction Oversight

Introduction

FHWA must work closely with State DOTs to ensure that the construction of highways on the Federal-aid system is subject to appropriate public oversight and meets industry standards for safety, durability, and economic efficiency. While direct oversight responsibilities primarily lie with the State DOTs per 23 CFR 635.105, FHWA staff are responsible for assuring that Federal-aid highway construction funds are expended in accordance with law, regulation, and policy and that the public is getting a quality product. Assurance can only be made when FHWA Division Offices provide FHWA oversight of the State DOT's construction and inspection program and the construction of the project. FHWA oversight may be accomplished in a variety of ways, but Major Project or TIFIA oversight requirements may apply as well as other statutory requirements. A project-specific oversight agreement allows FHWA and the State DOT to lay out these requirements and to define the responsibilities of each party.

Legal Context for FHWA Construction Oversight

23 U.S.C. 114—"The construction of any Federal-aid highway or a portion of a Federal-aid highway shall be undertaken by the respective State transportation departments or under their direct supervision....***such construction shall be subject to the inspection and approval of the Secretary.***"

23 U.S.C. 109(a)—"...the Secretary shall ensure that the plans and specifications for each proposed highway project under this chapter provide for a facility that will (1) adequately serve the existing and planned future traffic of the highway in a manner that is conducive to safety, durability, and economy of maintenance; and (2) be designed and constructed in accordance with criteria best suited to accomplish the objectives described in paragraph (1)..."

23 U.S.C. 106(g)(5)(A)—"...***nothing in this section, shall affect or discharge any responsibilities or obligations of the Secretary under*** [title 23, U.S.C.,] or other Federal law..."

23 U.S.C. 302(a)—"Any State desiring to avail itself of the provisions of this Title shall have a State transportation department which shall have adequate powers, and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by this Title."

Construction Oversight for P3 Projects

FHWA's basic construction oversight responsibilities for P3 projects are no different than they are for any Federal-aid project. All P3 projects that receive Federal-aid funds such as TIFIA loans are subject to all Title 23 requirements, including FHWA construction oversight; however, there may be some special considerations for P3 projects that will be accounted for in the FHWA Division Office's construction management programs and oversight agreements. P3 projects may be subject to different types of risks and include arrangements for allocating risks to the private sector that differ from traditional projects. Taking this into account, the FHWA Division Offices will recognize these risks in their risk assessments of State and local transportation agencies' Federal-aid construction programs. In many cases, the size and complexity of a P3 project may warrant the assignment of designated FHWA Division Office staff to assist in the oversight of the project. Additionally, P3 projects may allocate responsibilities to the private sector that are traditionally retained by public agencies. For example, construction inspection responsibilities may be allocated to an independent engineer. FHWA Division Offices are responsible for ensuring that



these responsibilities are carried out in conformance with approved standards and Federal laws and regulations.

Quality Assurance for P3 Projects

Title 23 CFR 637.207(b) establishes additional Quality Assurance Plan/Program (QAP) requirements for design-build projects, though the core functions of contractor quality control and agency acceptance do not change for P3 projects and the core components of QAPs are applicable for Federal-aid NHS projects regardless of delivery method. Most importantly, *the contractor cannot assume the agency's responsibility for acceptance* (23 CFR 637.207(b)) and the P3 project's contract documents should clearly define the roles of the project sponsor, the State DOT and private contractor in construction quality assurance.

The FHWA Division Office will not approve a QAP if there is any ambiguity of responsibility or if any assignment of roles contradicts the requirements of 23 CFR 637. FHWA's *Construction Quality Assurance for Design-Build Highway Projects TechBrief* may be a useful reference.

Stewardship and Oversight Agreements

According to FHWA S&O Agreement guidance, "projects using Federal innovative financing instruments such as TIFIA loans, GARVEE loans, or the establishment of a State Infrastructure Bank with Federal-aid funds should be acknowledged in the Agreement, and the appropriate level of Division Office oversight discussed in the Agreement". Since P3 agreements, typically use such innovative financing instruments, States with P3 enabling legislation, should take into account oversight roles and responsibilities for P3 projects in their S&O Agreements.

Some Stewardship and Oversight agreements already take into account oversight roles for P3 projects. For example, the Virginia S&O Agreement includes a section on "Alternative Contracting." The Texas Division, on the other hand, developed an *Oversight Agreement for Public-Private Partnership Projects* that is separate from the S&O Agreement and defines the relationship between FHWA and other agencies involved in P3 projects.

Projects of Division Interest (PoDI) Plans

FHWA guidance on S&O Agreements supports a risk-based approach to project stewardship and oversight, where projects that meet criteria as having elevated levels of risk may be designated as PoDI. PoDI are projects identified by Division Offices that have an elevated level of risk (threat or opportunity) to the unit's successful delivery of Federal Highway Program. Projects of Corporate Interest (PoCI) are a subset of PoDI that Division Offices identify that are so significant at a corporate level that FHWA assesses stewardship and oversight resource needs at a higher level. Project-specific plans for PoDIs and PoCIs, or plans on groups of these PoDI and PoCI projects, can be used to document any of FHWA's retained assumptions or other oversight strategies.

Since P3 projects are typically large and complex and use innovative contracting and financing techniques, P3 projects will typically meet the criteria established in S&O agreements to be designated as PoDI/PoCI. Division Offices will develop project plans for P3 projects designated as PoDI/PoCI that clearly establish the FHWA oversight activities for the project.



References

Federal Highway Administration. (2004, August). Construction program management and inspection guide. Retrieved from www.fhwa.dot.gov/construction/cpmi04.pdf.

This Guide is a tool for developing division-level construction management programs: determining the level of inspection coverage, performing the inspection and reviews, preparing and distributing reports, monitoring findings, preparing special reports, and documenting the division's program.

Federal Highway Administration. (2012, April 30). Construction quality assurance for design-build highway projects, Publication No. FHWA-HRT-12-039. Retrieved from www.fhwa.dot.gov/publications/research/infrastructure/12039/12039.pdf.

FHWA released this TechBrief to help clarify the roles, responsibilities, and activities related to construction quality assurance for design-build projects.

Federal Highway Administration – Texas Division. (n.d.). Oversight agreement for public-private partnership projects. Retrieved from [ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/ttc-69/4%20reference%20information%20documents/\(2\)%20documents%20applicable%20to%20corridor/\(1\)%20fhwa%20agreement/fhwa%20txdot%20oversight%20agreement.pdf](http://ftp.dot.state.tx.us/pub/txdot-info/tta/ttc-69/4%20reference%20information%20documents/(2)%20documents%20applicable%20to%20corridor/(1)%20fhwa%20agreement/fhwa%20txdot%20oversight%20agreement.pdf)

The Texas Division has a programmatic oversight agreement for design-build and P3 projects that defines the relationship between FHWA and other agencies involved in P3 projects.

Federal Highway Administration – Virginia Division and Virginia Department of Transportation. (2012, November). Stewardship and oversight agreement. Retrieved from www.virginiadot.org/business/resources/const/StewardshipOversightAgreement.pdf

This stewardship and oversight agreement demonstrates how a Division Office may share oversight responsibilities of P3 projects with the State sponsor.

Federal Highway Administration – Texas Division. (2011, November 9). Federal Highway Administration supplement to the Texas Division Office stewardship/oversight agreement for the oversight of the SH 121/Chisholm Trail Turnpike project. Retrieved from <https://one.dot.gov/fhwa/IPD/ipdhelp/Technical%20%20Assistance%20Archives/TX%20Division%20Oversight%20Agreement.pdf>

The Texas Division Office has made an example P3 project-specific oversight agreement accessible via SharePoint as a reference for other Division Offices.

Federal Highway Administration (December 2013) Stewardship and Oversight Guidance. Retrieved from <http://our/office/fhwa.dfs/soguidance/SOGuidance/Forms/General%20Guidance.aspx>

This document provides guidance on the development of stewardship and oversight agreements.

Federal Highway Administration (June 2013) Projects of Division Interest Guidance. Retrieved from <http://our/office/fhwa.dfs/RBSO/docs/Forms/PoDIDocuments.aspx>

This document provides guidance on the selection of Projects of Division Interest and the development of Projects of Division Interest Stewardship and Oversight Plans.

Florida Department of Transportation and Federal Highway Administration. (2010, July 22). Florida Federal-aid Partnership Agreement. Retrieved from www.fhwa.dot.gov/federalaid/stewardship/agreements/pdf/fl.pdf

This resource from Florida is an example of a partnership agreement that clarifies the stewardship and oversight roles and responsibilities of the FHWA Division Office and State DOT.



Texas Department of Transportation. (2011, July 25). Quality assurance program for design-build projects with an optional 15-year capital maintenance agreement. Retrieved from ftp://ftp.dot.state.tx.us/pub/txdot-info/cst/qap_db.pdf

This QAP from Texas may be a useful reference for developing a QAP for design-build projects, especially when supplemented with the implementation guide below.

Texas Department of Transportation. (2011, November 1). TxDOT design-build quality assurance program implementation guide. Retrieved from http://ftp.txdot.gov/pub/txdot-info/cst/db_qap_guide.pdf

This guide from Texas provides practical guidance in implementing a design-build QAP (such as the one referenced above) during construction and closing out a design-build project.